001197 JAN 24 [redacted]

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

M.S., on behalf of S.S. his minor child,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF YONKERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAUREN A. BAUM
NEAL HOWARD ROSENBERG
LAW OFFICES OF
NEAL HOWARD ROSENBERG
Nine Murray Street
Suite Four West
New York, NY 10007
(212) 732-9450

JEFFREY L. SHERNOFF
Counsel of Record
GREENBERG & SHERNOFF
Nine Murray Street
New York, NY 10007
(212) 619-3530

Attorneys for Petitioner

164743

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

93 pp

QUESTION PRESENTED

Whether this Court's determination in *Board of Educ. v. Rowley*, 457 U.S. 176 (1982), binds a district court judge to the decision of the administrative review officer, when that officer is required to have little or no particular expertise in education matters, and when the decision concerns the appropriateness of a private educational placement and not a choice of educational methodology, that is, whether the discretion of the district judge is solely limited to rulings based upon procedural issues or upon interpretations of law?

PARTIES TO THE PROCEEDING

Petitioner M.S. is the parent of S.S., a child with a disability, both of whom reside in the respondent's school district.

Respondent, Board of Education of the City School District of the City of Yonkers ("Board of Education"), is a government entity charged by law with responsibility for the operation, management, and control of the City School District of the City of Yonkers.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Regulatory Provisions Involved	2
Statement of the Case	3
A. Background	3
B. Procedural History	10
Reasons for Granting the Writ	13
I. The Law Regarding The Degree Of Deference To Be Accorded An Administrative Determination Is Unclear As The Decision Of The Court Of Appeals Conflicts With Decisions Of The Other Circuits, As Well As The Law Of New York State.	13

Contents

Page

II. The Question Presented Is Important As The Decision Of The Court Of Appeals Has A Particularly Debilitating Effect On The Right Of Parents To Seek The Full Judicial Review Granted Them Under The I.D.E.A. 18

III. The Court Of Appeals Decision Was Premised On An Inappropriate And Facile Extension Of The Rowley Decision. 19

IV. The Courts Are Charged With Fashioning A Remedy For The Wrong Done To This Child 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Oregon, 195 F.3d 1141 (9th Cir. 1999) .. 17

Board of Educ. v. Rowley, 457 U.S. 176 (1982) ..... i, 13, 14, 15, 16, 17, 19

Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992) 20

Briggs v. Board of Educ., 882 F.2d 688 (1989) 14

Burilovich v. Board. Of Educ. of the Lincoln Consol. Sch. Sys., 208 F.3d 560 (6th Cir. 2000) 15, 16

Charter Oak Unified Sch. Dist., No. SN 1157-98, 33 I.D.E.L.R. 202 (Dec. 6, 1999) 22

Dell v. Board of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053 (7th Cir. 1994) 20

Doe v. Alabama Dep't of Educ., 915 F.2d 853 (11th Cir. 1990) 17

Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982) 15

Doe v. Metropolitan Nashville Public Sch., 133 F.3d 384 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 47 (1998) 15

Cited Authorities

Page

Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991) 16

Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998) 16

Jefferson County Bd. of Educ. v. Alabama Dep't of Educ., 853 F.2d 853 (11th Cir. 1988) 17

Lenn v. Portland Sch. Comm., 998 F.2d 1083 (1st Cir. 1993) 14

Morton Community Unit Sch. Dist. No. 709 v. J.M., 152 F.3d 583 (7th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999) 16

Peck v. Lansing Sch. Dist., 148 F.3d 619 (6th Cir. 1998) 15

Roncker ex. rel. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) 15

Teague Independent Sch. Dist. v. Todd L., 999 F.2d 127 (5th Cir. 1993) 15

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998) 14, 20

Cited Authorities

Page

Statutes:

20 U.S.C. § 1412 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 11

28 U.S.C. § 1415(i)(2) 2

28 U.S.C. § 1415(i)(2)(B)(iii) 22

New York Education Law § 4403 18

New York Education Law § 4404 18

New York Education Law § 4404.2 18

New York Education Law § 4404(3) 17

New York Civil Practice Law and Rules § 7803 ... 17

Rule:

United States Supreme Court Rule 13.1 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided October 26, 2000 ..... 1a

Appendix B — Amended Memorandum And Order Of The United States District Court For The Southern District Of New York Dated February 7, 2000 ..... 20a

Appendix C — Decision Of The University Of The State Of New York, The State Education Department Dated October 6, 1998 ..... 33a

Appendix D — Impartial Hearing Officer's Introductory Materials, Discussion, And Decision Dated June 17, 1998 ..... 48a

Petitioner, M.S. on behalf of S.S., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *M.S., on behalf of S.S., his minor child, v. Board of Education of the City School District of the City of Yonkers*, 231 F.3d 96 (2d Cir. 2000). (App. A).[1] The opinion of the District Court in *M.S., on behalf of S.S., his minor child v. Board of Education of the City School District of the City of Yonkers* is unreported, but is reproduced in the Appendix. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on October 26, 2000. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days after entry of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

1. References to the Appendices to the petition will be in the form, "App. A at #a."

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. § 1415(i)(2) (the "Individuals with Disabilities Act" or "I.D.E.A.") provides, in relevant part:

> (A) In general
>
> Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.
>
> (B) Additional requirements
>
> In any action brought under this paragraph, the court:
>
> > (i) shall receive the records of the administrative proceedings;
> >
> > (ii) shall hear additional evidence at the request of a party; and
> >
> > (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

A. Background

At the time this case was initiated, S.S. was a nine-year-old child in the third grade PEARLS Program (Program for Early and Rapid Learners) in the respondent's Hawthorne School. JA 10, 159, 165.[2] The PEARLS program is a general education program for gifted and talented children selected by scores on a psychological evaluation upon entering the pre-kindergarten program. JA 7.

His kindergarten report card indicates that S.S. had difficulty keeping up academically and was deficient in the basics. JA 210. His first grade teacher noted his attentional needs, and his second grade teacher remarked that he still struggled with reading. JA 210. The third grade report card indicated that not only was S.S. below grade level in most areas, but that he was extremely active and easily distracted, as well. JA 14, 210. Since the screening test used for evaluating three to four-year-old children for PEARLS is highly verbal, problems such as those experienced by S.S. may not yet be apparent at that early age. JA 10.

As S.S. began to exhibit difficulty, he began tutoring outside of school and later received Computer Assisted Instruction ("CAI") while in school. JA 13. School report cards indicate that S.S. received extra help from his teacher during the 1993/1994 school year; that his aunt, a fourth grade teacher, tutored him throughout the 1994/1995 school year; that during the 1995/1996 school year he received

---

2. "JA" refers to the Joint Appendix filed in the Court of Appeals.

CAI services; and that during the 1996/1997 school year he received both private tutoring and resource room services; yet, with a history of private interventions, at least some at the suggestion of school officials, Board of Education representatives never referred S.S. to the Committee on Special Education ("C.S.E.") for special education services. JA 34-35, 163, 209.

S.S. was finally referred to the C.S.E. by his parents during the third grade as they believed that difficulties in reading and writing would effect other subject areas as well. JA 8. The C.S.E. evaluated S.S. and found that his verbal I.Q. of 119, was thirty-two points higher than his performance I.Q. of 87, indicating that S.S. had difficulty in visual-motor tasks. JA 8-9. This significant discrepancy of approximately twenty-five percent indicated a learning disability, according to the C.S.E chairperson, who holds a Master's Degree in Special Education. JA 7, 13.

According to his third grade teacher, S.S. experienced weakness in the areas of word attack skills, phonic skills, spelling, and creative writing, and in his attentional skills. JA 20-22. However, there is some controversy regarding what his actual academic performance levels were during that year.

In October 1996, his teacher sent a report to the C.S.E. describing his reading level as 2.5, but stated that they were using a book at a 3.0 grade level. JA 169. His mathematics teacher reported his instructional level in that area as "beginning of grade 3." JA 170. His writing level was recorded as 2.5. JA 171. In December 1996, a private psychologist, Oriole Peterfreund, evaluated S.S. using the Wide Range Achievement Test-3, and found both his reading

and arithmetic to be only at a second grade level. JA 177. Administration of the Gray Oral Reading Test-3 by this same evaluator found his reading rate and comprehension to be at a late first grade level. JA 177. This evaluator recommended that S.S. receive intense individual remediation to enable him to achieve at a level commensurate with his age and ability. JA 179.

In January 1997, the Board of Education's psychologist repeated the Wide Range Achievement Test-3, and since the test had just been administered to S.S. the month before, these new results should be viewed with some skepticism due to the repeat effect; however, even this evaluator found S.S.'s reading skills to be at a third grade level and his arithmetic skills to be at a second grade level. JA 183. The February 1997 Individualized Education Program ("I.E.P.") ignores the private testing done only three weeks before their own, as does the May 1997 I.E.P. JA 195, 242.

By his teacher's report, S.S. had an instructional reading and math level of 3.0 in May 1997. JA 205-06. However, the I.E.P. lists the teacher as assessing S.S.'s math, reading, and writing as at the second grade level in May 1997. JA 11, 242. This corresponds to the assessment of S.S.'s reading skill in September 1997 upon entering Stephen Gaynor School ("Stephen Gaynor"). JA 31. Assuming these to be accurate assessments, S.S. showed no improvement in his reading or arithmetic skills from the December 1997 private evaluation, despite the addition of resource room services by the Board of Education and private tutoring.

Although the C.S.E. did not have before it an official medical diagnosis for S.S. of attention deficit disorder or attention deficit hyperactivity disorder, their own documents

before them were replete with references to attentional and hyperactivity issues. JA 19. According to his classroom teacher, S.S. had so much difficulty sitting at a classroom table, that the other students complained about his constant movement and noise. JA 14, 205. She indicated that he even had more difficulty sitting still for short periods of time. JA 15, 205. His mathematics teacher reported that S.S. was usually not focused on the assigned tasks. JA 15, 206. In an observation of S.S., while he was in a group of only five students, the observer remarked

> 4 children highly engrossed. [S.S.] detached. Physically somewhat removed. Staring into space. Rocked back & forth. Played with pencil against hand and leg. Greeted a teacher who passed by. Rubbed pencil on floor. Leaned in closer to group listening to other group members. Hummed to himself loudly. Wrote on his pants. Separated further from the group [illegible] . . . The rest of the class was attentive and fully engaged in the task assigned to the groups. [S.S.'s] behavior stood out and attracted the attention of other children who looked at him, watched for a time, and returned to their work. No one commented to him, and he appeared unaware of being observed by them.

JA 18-19, 186-87. His third grade teacher testified that this was a fairly accurate observation of S.S. and that it was typical of his behavior during the 1996/1997 school year. JA 25. In addition to their own reports, the C.S.E. had before them Oriole Peterfreund's private psychological evaluation and psychological update of S.S. which also alluded to attentional issues, impulsivity, and a possible over involvement with fantasy, in addition to deficits in basic skills. JA 14, 179, 203.

S.S.'s third grade teacher testified that S.S. continued to exhibit these attentional issues from October through May (despite the addition of resource room services by the February I.E.P.). JA 25. She also opined that there was very little improvement in the area of creative writing and spelling. JA 25. Her report, written at the end of the year, stated that S.S. was "extremely active and easily distracted," indicating little or no improvement in that area, either. JA 26, 210. These attentional issues were later characterized as severe in September 1997, by his teacher at Stephen Gaynor. JA 28.

Upon entering Stephen Gaynor School in September 1997, S.S.'s teacher described his attentional issues as severe, and that he required refocusing every few minutes. JA 28-29. She also noted that he had a language/auditory processing disability, in that he had difficulty following directions. JA 28-29. Other difficulties were found in memory, sound-symbol relationship, temporal difficulties, and sequencing difficulties which effected his ability to organize and write in an expository style, as well as his ability to work through word problems in mathematics. JA 28-29. This teacher opined that because of these difficulties it would be very difficult for S.S. to function in a fourth grade classroom for three-quarters of the school day, and further opined that because of his disabilities his self-esteem would suffer. JA 29.

In February, 1997, the C.S.E. recommended that S.S. receive one period of resource room services per day. JA 9. The resource room teacher, who coincidentally was S.S.'s tutor at the time, stated that the resource room programs were already operating at capacity, meaning five or more students. JA 35. S.S., himself, told his father that the resource room program's enrollment exceeded five. JA 35. In addition, the I.E.P. that resulted from that meeting contained no goals or objectives by which to measure S.S.'s performance.

S.S. was the only child in PEARLS to be removed from the general education classroom for resource room services. JA 13. There was no evidence presented regarding how this effected his self-esteem. The C.S.E. chairperson testified that the teacher and the resource room teacher determine when a child is to be removed from the general education classroom for resource room services, but there was no testimony as to when S.S. was removed for resource room, or what academic class he missed while in the resource room. JA 17. As to coordination of professional effort to remediate S.S.'s difficulties, the classroom teacher testified that there were no regularly scheduled meetings between herself and the resource room teacher, that there was no time given to confer together, but that they would see each other while passing in the hall. JA 26. Moreover, there was no testimony regarding the methodologies, techniques, or materials used in the resource room to remediate S.S.'s deficits or address his disabilities.

The parents expressed their concerns regarding the February I.E.P. and the recommended program, and as a result another C.S.E. conference was scheduled. JA 13, 198-202. S.S. was then classified as learning disabled (the prior I.E.P. had indicated the classification was "[t]o [b]e [d]etermined.") JA 194, 239. The C.S.E., who cannot recommend that a child be removed from PEARLS unless they recommend a self-contained class, recommended that S.S. receive two periods of resource room services per day. JA 9-10. Although the C.S.E. chairperson testified that "[b]ecause he was making improvement, [they] felt an additional period of resource room would only be more helpful," they did not counsel the parents that they could or should seek to remove S.S. from the PEARLS program, nor did they offer the parents an option other than an additional

period of resource room. JA 12, 18, 36. The parents disagreed with the recommendation of the C.S.E., placed S.S. in the Stephen Gaynor School for the 1997/1998 school year, and notified the Board of Education of their intentions by a letter dated June 16, 1997. JA 159.

As a result of their dissatisfaction with the educational program recommended by the Board of Education, S.S.'s parents enrolled him in the Stephen Gaynor School. As described by S.S.'s teacher, Ms. Miller, Stephen Gaynor is a school of approximately one hundred eight learning disabled children of normal to above normal intelligence. JA 27. During the 1997/1998 school year, S.S. was in a class of nine children, nine to ten-years-old, taught by two co-teachers possessing Master's level degrees, and an assistant teacher working towards her Master's degree. JA 28. The children were broken into even smaller groups for reading and math instruction, but even so, S.S. still required reading and math remediation in groups of two children taught by a specialist twice per week. In addition to the reading and math remediation services, S.S. also worked with a language specialist twice per week, again in a group of two children, and received occupational therapy services within the classroom setting. JA 28, 32. Within the classroom, S.S. was taught using manipulatives and teacher-made materials. JA 29-30.

When asked whether S.S. had made progress, Ms. Miller testified that she had not seen progress in attentional issues until S.S. began medication, but that she had seen academic improvement. JA 30. (This testimony was misconstrued by the Impartial Hearing Officer, but properly understood by the State Review Officer to refer to a lack of progress in attentional issues prior to the start of medication. Ms. Miller

clarified her testimony in an Affidavit submitted to the District Court. JA 73, 83, 85-88, 130.) S.S.'s progress at Stephen Gaynor is illustrated by an in-house report prepared by his teacher. JA 31, 214-38. From an initial reading level of a 2.0 grade equivalent, S.S. advanced to 2.5 at mid year, a gain of half of a school year in that much time. S.S.'s father testified that he had witnessed tremendous progress made over the course of the year at Stephen Gaynor. JA 35. S.S.'s reading ability had improved, and he loved to read, his handwriting was now neatly on the line, and he could write using script. JA 35-36. In the social/emotional area, S.S. had friends from school, and no longer found it necessary to crawl into his parents' bed, but could sleep alone. JA 36.

B. Procedural History

This case originated as a due process impartial hearing to challenge a board of education's educational plan for a gifted child with special needs. The decision of the impartial hearing officer was first appealed to the State Review Officer of the New York State Education Department, then to the United States District Court of the Southern District of New York by M.S., and then by the Board of Education to the Court of Appeals.

The impartial hearing officer initially found that the Board of Education had provided the child, S.S., with an appropriate education, that the program at the private school chosen by the parents was inappropriate, and denied the parents tuition reimbursement for the private placement. App. B. at 59a.

On appeal, the state review officer held that the Individualized Education Program designed by the Board of

Education did not adequately describe the extent of the child's disability, and that the computer generated statements in that document did not include "adequate objective data to establish a baseline from which the child's progress could be measured" during the coming school year, and that the annual goals were too vague to afford the child's teacher with direction regarding the Committee on Special Education's expectations; however, though he found that the Board of Education had therefore not proved the appropriateness of its educational program, he also held that the parents had not demonstrated the appropriateness of the private school, and applying the requirement that disabled children be placed (by public educational agencies) in the least restrictive educational environment, denied the parents tuition reimbursement for the private special education placement. App. C at 43a-46a.

The parents appealed the decision of the state review officer to the United States District Court, Southern District of New York, pursuant to 28 U.S.C. § 1331. United States District Judge Barrington D. Parker, Jr., concurred with the state review officer's finding that the Committee on Special Education of the Board of Education of the City School District of the City of Yonkers had not drafted an Individualized Education Program that was reasonably calculated to confer educational benefit on the child, S.S., and overruled the state review officer by holding that an "appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement," thus the test for the parents' private unilateral educational placement was not perfection. App. B at 28a-32a. Judge Parker, Jr., ultimately decided that the parents' unilateral placement of the child in the Stephen Gaynor School had addressed the child's special needs, and may have

well been "the least-restrictive environment necessary to provide S.S. with a meaningful education and not just trivial advancement" and awarded the parents tuition reimbursement for the 1997/1998 school year. App. B at 32a.

The Board of Education appealed to the United States Court of Appeals for the Second Circuit. On October 26, the Court of Appeals reviewed the case *de novo*, declined to disturb the state review officer's finding that the Board of Education had not sustained its burden of proving that their I.E.P. was "reasonably calculated" to deliver "educational benefits" to S.S. and upheld the decision of the district court in that regard. The Court of Appeals further found, however, that an assessment of educational progress is a judgement best left to the state review officer's expertise. The Court of Appeals therefore upheld the state review officer's decision regarding the appropriateness of the private school, and reversed the district court, declining to award the parent tuition reimbursement, despite their finding that the Board of Education had failed to offer a free and appropriate education to S.S.

REASONS FOR GRANTING THE WRIT

I. The Law Regarding The Degree Of Deference To Be Accorded An Administrative Determination Is Unclear As The Decision Of The Court Of Appeals Conflicts With Decisions Of The Other Circuits, As Well As The Law Of New York State.

While the I.D.E.A. is clear that a court charged with reviewing the findings of administrative proceedings under that act must base its decision on the preponderance of the evidence, this Court further established that due weight must be accorded to the administrative proceedings. *Board of Educ. v. Rowley*, 457 U.S. 176, 206 (1982). In *Rowley*, the Court, concerned with the choice between education methodologies for a deaf student, warned courts that the preponderance of evidence standard was "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities" and directed courts to give due weight to the results of administrative process. 458 U.S. 176, 205-07 (1982). The implication of the Court's decision is that a court should defer to education or school authorities when reviewing decisions regarding whether an educational methodology is appropriate for a child, or which educational materials are necessary to enable the child to make meaningful progress.

It is not clear whether this Court intended that the *Rowley* holding be extended to all decisions regarding educational matters. After reviewing the decisions following *Rowley*, the only thing clear about the degree of deference and when it is to be accorded to a decision of a administrative law judge/ state review officer, is that the timing and degree of deference

is very much unclear, ambiguous, and the outcome of an appeal will likely depend upon the circuit or court in which it was filed.

The United States Court of Appeals for the Second Circuit takes a conservative approach to the issue of deference. In deciding whether a state agency had offered a child an appropriate educational program, the United States Court of Appeals for the Second Circuit stated that "[d]eference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped." *Briggs v. Board of Educ.*, 882 F.2d 688, 693 (1989). As the Court of Appeals later held when again deciding the appropriateness of a district's educational program, "[t]wo issues are relevant to a federal court's review of a challenged I.E.P.: (1) whether the state complied with the procedural requirements of IDEA and (2) whether the challenged I.E.P. was 'reasonably calculated to enable the child to receive educational benefits.' " *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998) (quoting *Rowley*, 458 U.S. at 206-07 (1982)). The Court of Appeals held that the reviewing judge must give "due weight" to the administrative proceeding, as "the judiciary generally lack[s] the specialized knowledge and experience necessary to decide persistent and difficult questions of educational policy." *Walczak*, 142 F.3d at 129 (internal quotation marks and citation omitted).

The United States Court of Appeals for the First Circuit has held that appropriate review is more than an appraisal for clear error, but falls short of a complete *de novo* review of the state educational program. *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). This circuit appears to vary the weight accorded to the issue addressed,

that is, a greater degree of deference is due for policy issues than for factual issues. *See Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982).

The United States Court of Appeals for the Fifth Circuit has limited the due deference to be given to administrative law decisions, by holding that "due weight" does not require the district court to defer to the administrative law judge when that fact finder had "erroneously assessed the facts or erroneously applied the law to the facts." *Teague Independent Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

The United States Court of Appeals for the Sixth Circuit has interpreted the *Rowley* standard to mean that a greater deference is due to the state's *placement decision* if the I.D.E.A.'s procedural requirements have been met. *Roncker ex. rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) (emphasis added). That court has stated that the district court should not merely adopt the state administrative findings without independently examining the evidence and that "due weight" does not mean that a district court cannot disagree with a hearing officer's findings. *Doe v. Metropolitan Nashville Public Sch.*, 133 F.3d 384, 387 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 47 (1998); *see also Peck v. Lansing Sch. Dist.*, 148 F.3d 619 (6th Cir. 1998). The Circuit has utilized a modified *de novo* review. *Burilovich v. Board. Of Educ. of the Lincoln Consol. Sch. Sys.*, 208 F.3d 560, 565 (6th Cir. 2000) (citations omitted).

> [A]dministrative findings in an IDEA case may be set aside only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise,

> a fair estimate of the worth of the testimony, or both. A court should defer to the administrative findings only when educational expertise is relevant to those findings and the decision is reasonable. By so deferring, "due weight" will have been given to the state administrative proceedings.

Burilovich v. Board Of Educ. of the Lincoln Consol. Sch. Sys., 208 F.3d 560, 567 (6th Cir. 2000). District courts are apparently advised to perform a *de novo* review, except as to those issues requiring educational expertise.

The United States Court for the Seventh District has stated that *Rowley* does not require the abdication of judicial function, but that review under the I.D.E.A. requires a judge to independently and critically review the evidence before him, while being mindful that choices between competing theories and methods are best left to those with educational expertise who have considered the facts and then made a reasonable decision. *See Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583, 588 (7th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

The Fourth, Ninth, and Eleventh Circuits appear to take a more flexible approach. The United States Court of Appeals for the Fourth Circuit has held that due weight must be accorded to the hearing officer, because local educators deserve lattitude in choosing the educational *program* appropriate for a child with a disability. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998) (emphasis added). The court need not heed the administrative findings, but if not following the hearing officer's findings of fact, the court must explain why. *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991).

Similarly, the United States Court of Appeals for the Ninth Circuit has held that the findings of the administrative agency must be considered carefully, that an attempt must be made to respond to the hearing officer's resolution of each issue, and the deference accorded must be reflective of the thoroughness and completeness of the hearing officer's work, but after that consideration, a court may accept or reject the hearing officer's findings. *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999).

The United States Court of Appeals for the Eleventh Circuit also has a liberal interpretation of the *Rowley* standard, and the amount of deference given to an administrative decision in that circuit is left to the discretion of the district judge, who after considering the administrative findings is free to accept or reject them. *Doe v. Alabama Dep't of Educ.*, 915 F.2d 853 (11th Cir. 1990); *Jefferson County Bd. of Educ. v. Alabama Dep't of Educ.*, 853 F.2d 853 (11th Cir. 1988).

In New York State, differences exist in the standard of review even between the federal district court and the state courts. Pursuant to New York Education Law § 4404(3) and New York Civil Practice Law and Rules § 7803, state courts apply a substantial evidence rule of review, not a preponderance of the evidence rule, in contrast to the I.D.E.A. mandate to consider the preponderance of the evidence. Therefore the basic standard applied to the review of the administrative decision is greater in the district court than it would be in state court, even before considering the strict deference to administrative decisions decreed by the Court of Appeals.

Due to the differences in the standard of review applied by the New York State courts, as well as the different circuit courts, the outcome of the Petitioner's appeal would be determined by the forum in which it was heard, as opposed to the merits of his argument, a result which is contrary to the intent of the I.D.E.A.

II. The Question Presented Is Important As The Decision Of The Court Of Appeals Has A Particularly Debilitating Effect On The Right Of Parents To Seek The Full Judicial Review Granted Them Under The I.D.E.A.

The effect of the Court of Appeals decision is to make the discretion of the state review officer unlimited and without boundary. This was not the Congressional intent behind the procedural safeguards built into the I.D.E.A. In New York State, the state education department is the agency responsible pursuant to the I.D.E.A., 20 U.S.C. § 1412 and New York Education Law § 4403 for assuring that school districts within the state provide free and appropriate educational opportunities to all children with disabilities, implementing the requirements of the I.D.E.A. The impartial hearing officer is an individual who is not employed by a school district, school, or program serving students with disabilities, and has not been so employed for two years prior to his appointment, and has, as well, completed a hearing officer training program. N.Y. Educ. Law § 4404 (McKinney's Supp. 2000). The state review officer, an agent and employee of the state education department, has the responsibility, pursuant to New York Education Law § 4404.2 to review and modify, to the extent deemed necessary in order to properly effectuate the purposes of Article 89 of the New York Education Law, any determination of an impartial hearing officer relating to a special education program provided by a board of education of a school district within the State of New York. Since the state appoints both the hearing and state review officers, by awarding complete and total deference to state review officer's decisions, the state is permitted to act without the specter of judicial oversight. It cannot be in the public interest

to allow a state actor, charged with a federal obligation under the I.D.E.A., to function without risk of judicial review. Nor can it be in the public interest to force parents to seek redress from the state office originally charged with providing a free and appropriate education to their child, when that agency has already failed their child, knowing that the courts cannot disturb the administrative findings of that state office. The unavailability of full judicial review will necessarily discourage parents from the exercise of their right to appeal the decision of a state office, as granted by the I.D.E.A.

III. The Court Of Appeals Decision Was Premised On An Inappropriate And Facile Extension Of The Rowley Decision.

In those instances where the administrative authority has no special educational expertise, where the decision to be reviewed requires no special expertise, or where the record below provides quantitative measures by which to form a rational judgment, it is contrary to the spirit of the I.D.E.A., and this Court's holding in *Rowley* for a judge to completely abdicate his responsibility to review the record and evidence before him, and to defer to the decision of the administrative authority. The *Rowley* Court was concerned with decisions regarding methodology and the placement decision of a school district, specifically the provision of a sign-language interpreter for a deaf child. The *Rowley* Court was not addressing the appropriateness of a private school once the school district's program had been determined to be inappropriate. To defer to the decision of the administrative authority, where no special educational expertise exists or is necessary to resolve the matter at issue vitiates the intent of the I.D.E.A. to permit aggrieved parents the right of appeal to a higher court.

In the present matter, we contend that the decision of the administrative decision maker was entitled to little or no deference. The administrative decision maker had no special expertise in matters of educational policy that would make his decision more valid than that of the district judge. Moreover, the decision to be reviewed required no special educational expertise as it involved not a matter of educational methodology, technology or materials, but whether a review of the testimony and evidence evinced measurable progress in the private school, proving the private school's appropriateness for S.S. The issue was not a "persistent and difficult question[] of educational policy," but whether the testimony of witnesses, standardized test scores, and teacher estimates of academic ability reflected sufficient educational gains made by S.S. in the private school to find that placement appropriate. App. A at 10a-13a (quoting *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998) (internal quotation marks and citation omitted)).

One reason given for the deference afforded to agency decisions is " '[b]ecause judges are not trained educators.' " *Dell v. Board of Educ., Tp. High Sch. Dist. 113*, 32 F.3d 1053, 1058 (7th Cir. 1994) (quoting *Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 715 (7th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992)). However, in instances such as the case at bar, there was no information in the record regarding the qualifications of the state review officer, his expertise, or the basis for awarding his decision the degree of deference it received. It is unwise to blindly award deference because of a title, in this case, state review officer. Any party asserting that deference should be paid to any lower authority decision, should, at the very least, be required to allege and prove the

basis for that deference beyond the existence of a mere job title. A degree in education, time spent making, reviewing or implementing educational policy are relevant determinants of the value of the decision maker's opinion.

The Court of Appeals was operating under a misapprehension of fact. In New York, the prerequisites for becoming a state review officer do not mandate expertise in the field of education. Therefore a state review officer's decision should not necessarily merit the deference that would be accorded to the decision of a former school superintendent, school psychologist, board of education member, or the like, unless the officer's qualifications and expertise were previously considered by the court before giving "due weight" to the officer's decisions. The state review officer in question does not have any special expertise, experience, or education, that would make him an expert, or make his judgment superior to that of the district court judge. This state review officer, while an employee of the state education department, has no degree in education, and his experience is in supervising the state professional board offices and discipline cases for the professions. Surely the district court judge was equally qualified to consider the record before him.

IV. The Courts Are Charged With Fashioning A Remedy For The Wrong Done To This Child

Each reviewing decision making authority in this case's history has held that the Board of Education failed to offer this child a free and appropriate public education, from the state review officer, to the district court judge, and finally to the Court of Appeals. The parent has relied upon this history of finding that the Board of Education failed to appropriately

serve his son, and continued his appeals in an attempt to find a remedy for the Board of Education's failure to offer his child an appropriate education. The law denies a parent reimbursement for a private unilateral placement that has been deemed by the decision making authority to be inappropriate, but in so doing, it rewards the school district for its failure to serve the students entrusted to its care. The district is left with no incentive to offer an appropriate educational placement in the future. The parent is left with no alternative.

The district court and the Court of Appeals each had a duty pursuant to the I.D.E.A. to design a remedy to address this child's unmet educational need. While the Court of Appeals may have found the District Court's award excessive, it had an obligation to design an appropriate remedy. *See* 28 U.S.C. § 1415(i)(2)(B)(iii). One such possibility would have been an award of compensatory education, or a partial tuition award to reimburse the parent for those services provided by the school that the court deemed appropriate for the child. *See generally Charter Oak Unified Sch. Dist.*, No. SN 1157-98, 33 I.D.E.L.R. 202 (California Special Education Hearing Office, University of the Pacific, McGeorge School of Law, Dec. 6, 1999) (hearing officer awarded compensatory reimbursement of one-third of tuition expenses due to failure of district to offer an appropriate education.) Although the Court of Appeals relied upon the educational expertise of the state review officer, and therefore denied the parent tuition reimbursement, the Court of Appeals still had a duty to design a remedy for the failure of the Board of Education to offer an appropriately designed education plan for S.S. Thus, the Court of Appeals failed as well to appropriately serve this child under the I.D.E.A.

CONCLUSION

Petitioner respectfully requests that his petition for a writ of certiorari be granted to review this important matter.

Respectfully submitted,

LAUREN A. BAUM
NEAL HOWARD ROSENBERG
LAW OFFICES OF
NEAL HOWARD ROSENBERG
Nine Murray Street
Suite Four West
New York, NY 10007
(212) 732-9450

JEFFREY L. SHERNOFF
Counsel of Record
GREENBERG & SHERNOFF
Nine Murray Street
New York, NY 10007
(212) 619-3530

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED OCTOBER 26, 2000

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 2142 — August Term, 1999

(Argued: July 14, 2000 Decided: October 26, 2000)

Docket No. 00-7178

M.S., on behalf of S.S. his minor child,

Petitioner-Appellee,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF YONKERS,

Respondent-Appellant.

Before: WALKER, *Chief Judge*, JACOBS and SOTOMAYOR, *Circuit Judges*.

* * *

JACOBS, *Circuit Judge*:

The Board of Education of the City School District of the City of Yonkers ("the School Board") appeals from a judgment of the United States District Court for the Southern

District of New York (Parker, *J.*), entered under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, ordering payment of reimbursement to the parent of a learning disabled child for tuition at a private school that educates learning disabled students only.

The School Board found that third-grader S.S. was learning disabled, and it developed an individualized education program ("IEP") that recommended one daily period of resource room services in a group of no more than five students for the remainder of the third-grade year. A proposed IEP for S.S.'s fourth-grade year recommended two such periods a day. The child's father, petitioner-appellee M.S., objected to the proposed IEP, unilaterally enrolled S.S. in a private school that educates only learning disabled students, and sought tuition reimbursement from the School Board. The School Board refused to pay, and M.S. appealed the School Board's decision through the administrative process implemented by New York State to conform with the requirements of IDEA. *See* 20 U.S.C. § 1415 (1994); N.Y. Educ. Law § 4404 (McKinney 1995 & Supp. 1999) (amended 1995). The state review officer determined that the proposed IEP was inadequate but ultimately refused to order tuition reimbursement because the highly restrictive environment of the private school did not afford an appropriate education for S.S.'s needs.

Dissatisfied, M.S. filed a petition for review in the district court pursuant to 20 U.S.C. § 1415(e)(2) (1994). The district court reviewed S.S.'s progress in the private school, ruled that parents are not bound (as school boards are) to seek the least restrictive learning environment, and reversed

the decision of the state review officer on a motion for summary judgment. In view of the deference owed to the administrative ruling that the private school was not an appropriate placement for S.S., we conclude that the administrative ruling should stand and therefore reverse the judgment of the district court.

BACKGROUND

A. *Underlying Facts*

The following facts are undisputed. From the age of three until the end of his third-grade year in 1997, S.S. was enrolled in the Yonkers School District program known as PEARLS, an acronym for Program for Early and Rapid Learners. In October 1996 — early in S.S.'s third-grade year — M.S. asked that his son be evaluated by the School Board's committee on special education ("CSE"). The CSE learned from S.S.'s teachers that the child was having difficulties with a variety of skills, including handwriting, reading, spelling and arithmetic.

In December 1996, S.S. was evaluated by Dr. Oriole Peterfreund, a private psychologist selected by M.S. Dr. Peterfreund determined that S.S. had a full scale IQ of 109, ranking him at the 75th percentile of his cohort, but that he was performing at second-grade level in reading, spelling and arithmetic, at percentiles 32, 21, and 34, respectively. After a battery of tests, Dr. Peterfreund concluded that S.S. had a learning disability and recommended, *inter alia*, that S.S. "receive intensive individual remediation to enable him to overcome his difficulties and to achieve at a level

appropriate for his age and ability." A month later, S.S. was evaluated by Dr. Raymond Copeland, a school psychologist, who concluded that S.S. "is not a candidate for Special Education at this time."

The CSE convened on February 3, 1997 to evaluate S.S.'s learning needs. After considering the teacher reports, the evaluations of psychologists Peterfreund and Copeland, and an assistant principal's observations of S.S. in group settings, the CSE concluded that S.S. should be classified as learning disabled within the meaning of IDEA. The CSE recommended that S.S. remain in the PEARLS program but also receive resource room services in a class of five students for one period per day. M.S. consented to the recommended placement.

The School Board thereafter developed an IEP which stated that S.S. should receive resource room services without specifying how often. M.S. wrote to the CSE expressing concerns. Among other criticisms, M.S. observed that "[t]he annual goals and objectives on [S.S.'s] IEP need to be made much more specific so that we can more readily determine his progress."

On March 10, 1997, S.S. began receiving resource room services one period a day. On April 8, 1997, the director of special education for the Yonkers Public Schools responded to M.S., agreed "that there are not enough goals listed to address [S.S.'s] learning needs especially in the area of handwriting," and recommended that S.S.'s case be referred "back to the CSE for another meeting for a 'case review' to revise the IEP." The director also proposed, subject to M.S.'s

view, that this revised IEP could serve as the IEP for S.S.'s fourth-grade year.

On May 2, 1997, Dr. Peterfreund performed a re-evaluation. The Gates MacGinitie Reading Test, Level C, revealed that S.S. was reading at a mid- second-grade level, the 20th percentile for his cohort. Dr. Peterfreund found "significant deficits in basic skills," and recommended that S.S. "receive intensive remedial instruction geared to his individual learning needs," adding: "Since this is a multifaceted problem affecting many areas of functioning including writing, spelling, language and math in addition to reading, it is felt that a special school setting with small class size that can provide a total learning environment would be the most appropriate placement for [S.S.]."

The CSE reconvened on May 21, 1997 to consider the IEP for S.S.'s fourth-grade year. The CSE recommended a second daily period of resource room services, and presented an IEP reflecting that recommendation.

M.S. did not accept the recommended placement; instead he enrolled S.S. in the Stephen Gaynor School, a private school that educates learning disabled students only. The CSE was advised of this decision by a June 16, 1997 letter from M.S.'s lawyer. M.S. requested an "impartial hearing" to seek tuition reimbursement under IDEA, but agreed to a delay in the hearing after the School Board agreed to arrange transportation to the Stephen Gaynor School. The CSE did not further reconsider S.S.'s situation.

Appendix A

B. *Procedural History: Administrative Hearings*

An impartial hearing as mandated by IDEA, *see* 20 U.S.C. § 1415(b)(2) (1994); N.Y. Educ. Law § 4404(1) (McKinney Supp. 1999) (amended 1995), was held on April 23, 1998 to determine whether M.S. was entitled to tuition reimbursement under the test set forth in *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 369-70 (1985) (holding that reimbursement is authorized when the proposed IEP is inappropriate and the private school placement is appropriate). The classification of S.S. as learning disabled was not disputed during this hearing. Testimony was received from the CSE chairperson; one of S.S.'s teachers in the PEARLS program; the special education teacher coordinator at the Stephen Gaynor School; and M.S.

The impartial hearing officer ("IHO") found that M.S. was not entitled to tuition reimbursement on two alternative grounds: that the School Board was providing S.S. with an appropriate education; and that the program at the Stephen Gaynor School was inappropriate for S.S.'s needs.

M.S. appealed the decision of the IHO to a state review officer ("SRO") at the New York State Education Department. *See* 20 U.S.C. § 1415(c) (1994); N.Y. Educ. Law § 4404(2) (McKinney 1995). The SRO affirmed the denial of reimbursement on the ground that though the School Board's IEP was inadequate and inappropriate, the education afforded at the Stephen Gaynor School was also inappropriate.

Appendix A

As to the appropriateness of the education furnished by the School Board, the SRO found that the IEP for S.S.'s fourth-grade year (1997-98) inadequately described S.S.'s needs and the extent of his disability: "Although [S.S.'s] IEP has what appears to be a series of computer generated statements with respect to his academic, social and physical development and management needs, those statements do not include adequate objective data to establish a baseline from which [S.S.'s] progress could be measured during . . . 1997-98." The SRO also found that the IEP's annual goals and short-term objectives were "too vague to provide [S.S.'s] teacher with direction about the CSE's expectations." For example, "despite the fact that there is no dispute about [S.S.'s] very weak spelling skills, his IEP goals and objectives do not address his encoding (spelling) difficulties." In summary, the SRO found that the School Board "failed to meet its burden of proof with respect to the appropriateness of the educational placement which it offered to [S.S.] for the 1997-98 school year because of its failure to adequately describe his educational needs and to construct IEP goals and objectives which specifically addressed those needs."

As to whether M.S. had met his burden of establishing the appropriateness of the Stephen Gaynor School, the SRO found, first, that M.S. "ha[d] not demonstrated that his son's special education needs were addressed" at the Stephen Gaynor School; S.S.'s reading level had not improved at the school and his spelling level had declined. Second, M.S. had not shown that S.S.'s placement at the Stephen Gaynor School was "consistent with the requirement that children with disabilities be placed in the least *restrictive*

environment." The SRO was "not persuaded that [S.S.'s] management needs were so severe as to require the highly restrictive placement in a private school. Similarly, while [S.S.] had academic deficits, he had only recently been receiving resource room services and was benefitting from those services when the CSE recommended that he continue to receive resource room services."

C. *Procedural History: District Court*

M.S. appealed the SRO's decision to federal court, *see* 20 U.S.C. § 1415(e)(2) (1994), and the court decided the case on cross-motions for summary judgment.

As to the appropriateness of the education furnished by the School Board, the district court "concur[red] with the SRO's determination that the 1997/1998 IEP was not reasonably calculated to enable S.S. to receive educational benefits." The district court emphasized:

> • Dr. Peterfreund found in May 1997 that S.S. continued to need significant improvement in word analysis, phonic skills and decoding skills.
>
> • The IEP failed to describe the extent of S.S.'s disability, ignoring his difficulties with word analysis, decoding skills and spelling and ignoring as well that when adding double digits S.S. proceeded from left to right.

- The IEP "failed to include objective data to establish a baseline from which S.S.' progress could be measured during the year."

- The IEP's annual goals were vague.

As to whether M.S. had met his burden of establishing the appropriateness of the Stephen Gaynor School, the district court disagreed with the SRO. The district court emphasized that at his new school:

- S.S. received an individualized program which included frequent use of manipulatives suited to S.S.'s love of hands-on activities.

- S.S. received math instruction in a group of five students, reading instruction in a group of four students, and remedial reading, math and language instruction from specialists in a group of two students twice a week.

- S.S. learned all digraphs, his phonics "improved greatly," and he learned regrouping in math "very satisfactorily." His reading level improved from an initial 2.0 grade-level to a 2.5 grade-level.

- S.S. was given weekly phonetic packets to help his spelling.

The district court also held that the IDEA's least-restrictive environment requirement did not bar reimbursement, relying on *Warren G. v. Cumberland County School District*, 190

F.3d 80 (3d Cir. 1999). In *Warren G.*, the Third Circuit held that "[a]n appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement. Thus, the test for the parents' private placement is that it is appropriate, and not that it is perfect." *Id.* at 84 (citing *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 & n.8 (3d Cir. 1999)).

The School Board appeals the entirety of the district court decision.

DISCUSSION

We review the district court's grant of summary judgment *de novo*. *See J.D. v. Pawlet Sch. Dist.*, __ F.3d __, 2000 WL 1145758, at *3 (2d Cir. Aug. 15, 2000); *Muller v. Committee on Special Educ.*, 145 F.3d 95, 102 (2d Cir. 1998). Federal courts assess IDEA petitions based on the "preponderance of the evidence developed at the administrative proceedings and any further evidence presented by the parties." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122-23 (2d Cir. 1998) (citing 20 U.S.C. § 1415(e)(2) (1994)). However, this assessment "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (considering the Education for All Handicapped Children Act, subsequently amended and renamed IDEA). "While federal courts do not simply rubber stamp administrative decisions, they are expected to give 'due weight' to these proceedings, mindful that the judiciary generally 'lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult

questions of educational policy.' " *Walczak*, 142 F.3d at 129 (quoting *Rowley*, 458 U.S. at 206, 208 (internal quotation marks and citation omitted)); *see also Karl v. Board of Educ.*, 736 F.2d 873, 876-77 (2d Cir. 1984) (mandating such deference even when SRO disagrees with IHO).

To receive federal funding under IDEA, a state must, *inter alia*, provide to all children with disabilities "a free appropriate public education." 20 U.S.C. §§ 1400(c), 1412(1) (1994); *see also Walczak*, 142 F.3d at 122; *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1115 (2d Cir. 1997). When a state receiving IDEA funding fails to give a disabled child such an education, the child's parent may remove the child to an appropriate private school and then seek retroactive tuition reimbursement from the state. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985). A court may award tuition reimbursement "if it appears (1) that the proposed IEP was inadequate to afford the child an appropriate public education, and (2) that the private education services obtained by the parents were appropriate to the child's needs." *Walczak*, 142 F.3d at 129 (citing *Burlington*, 471 U.S. at 370); *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993) (emphasizing that award of tuition reimbursement is discretionary); *Muller*, 145 F.3d at 104-05; *Still v. DeBuono*, 101 F.3d 888, 891-92 (2d Cir. 1996).

A. *Appropriateness of IEP*

We consider two issues to determine whether the IEP for S.S.'s fourth-grade year was appropriate: (1) whether the School Board complied with the procedural requirements of

IDEA, and (2) whether the IEP was "reasonably calculated" to confer "educational benefits." *Rowley*, 458 U.S. at 206-07; *accord Muller*, 145 F.3d at 101; *Walczak*, 142 F.3d at 129; *Briggs v. Board of Educ.*, 882 F.2d 688, 691 (2d Cir. 1989). The School Board shoulders the burden of proof with respect to both of these issues. *See Walczak*, 142 F.3d at 122.

"The initial procedural inquiry is no mere formality." *Id.* at 129. The Supreme Court has stated that "adequate compliance with the procedures prescribed [by IDEA] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. Accordingly, we normally determine whether an IEP states: "(1) the child's present level of educational performance; (2) the annual goals for the child, including short-term instructional objectives; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a school setting; (5) the projected initiation date and duration for proposed services; and (6) objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." *Walczak*, 142 F.3d at 122 (citing 20 U.S.C. § 1401(a)(20) (1994)).

The School Board does not contest the district court's conclusion that the IEP for S.S.'s fourth-grade year failed to meet several of the procedural requirements of IDEA; but the School Board argues that an IEP cannot be invalidated

on procedural defects alone. If for no other reason, this argument is unpersuasive because the district court supplemented its analysis of procedural inadequacy with the finding that the "IEP was not reasonably calculated to enable S.S. to receive educational benefits." We therefore consider whether the School Board supported its burden of demonstrating by a preponderance of the evidence that the IEP was "reasonably calculated to enable the child to receive educational benefits" — the second issue identified by *Rowley*, 458 U.S. at 207.

The district court reviewed the same record on which the SRO relied, and on that record upheld the SRO's ultimate finding. The district court cited the May 1997 evaluation of S.S. by Dr. Peterfreund, which indicated that S.S. continued to have difficulties with word analysis, decoding skills and phonics skills, despite the initiation of resource room services. However, the IEP for S.S.'s fourth-grade year did not reference S.S.'s conceded problems with word analysis and decoding skills, nor did it address S.S.'s spelling problems. The district court therefore agreed with the SRO that the IEP failed to describe the full extent of S.S.'s disability, or to include objective data from which S.S.'s progress could be established. We agree with this conclusion.

The district court's finding is generally supported by the observation that for an IEP to be "reasonably calculated to enable the child to receive educational benefits," *Rowley*, 458 U.S. at 206-07, it must be "likely to produce progress, not regression," *Walczak*, 142 F.3d at 130 (internal quotation marks and citation omitted). Our *de novo* review of the record reveals evidence that S.S.'s performance was not improving.

Appendix A

In December 1996, Dr. Peterfreund found that S.S.'s abilities in reading, spelling and math ranked him at the second-grade level only, and his oral reading rate and oral reading comprehension were slightly below the second-grade level. In May 1997, the proposed IEP for S.S.'s fourth-grade year stated that S.S.'s reading, writing and math abilities were still at the second-grade level, reflecting no progress between December 1996 and May 1997 despite the resource room services provided during part of that time. S.S.'s third-grade teacher also testified that S.S. made no improvements in spelling throughout his third-grade year.

As the School Board emphasizes, however, the record also indicates that S.S. was in fact making progress, as that term is used by *Rowley* and *Walczak*. S.S. received passing grades in third grade and was promoted to fourth grade. Ordinarily, such evidence would be sufficient for the School Board to establish that an IEP was appropriate under IDEA. "[T]he attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." *Walczak*, 142 F.3d at 130; *accord Rowley*, 458 U.S. at 207 n.28 ("When the [disabled] child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.").

Notwithstanding these indicators of progress, we decline to disturb the SRO's finding, upheld by the district court, that the School Board has not sustained its burden of proof on this point. The School Board agrees that S.S. is disabled within the meaning of IDEA, and admits that it prepared an

IEP that failed to describe or consider some of S.S.'s major learning difficulties. Once it is conceded that the IEP is materially incomplete in identifying the learning deficits acknowledged to exist, and the IEP has been found ineffective by the SRO as a tool for setting baselines and measuring progress, the School Board cannot rely on the passing grades it has given and the promotional decision it has made to argue that the remedial measures in the IEP are, as a matter of law, reasonably calculated to deliver educational benefits.

The substantial defects and omissions in the IEP deprive the fact-finder of data concerning S.S.'s initial abilities and deficits needed to measure S.S.'s subsequent performance. In light of the deference we owe to the SRO's findings, *see Briggs*, 882 F.2d at 693 ("Deference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped."), and the district court's reinforcement of that finding by pertinent references to the record, we agree that the School Board has not sustained its burden of demonstrating that the IEP was "reasonably calculated" to deliver "educational benefits" to this child.

We therefore conclude that the School Board failed to shoulder its burden of proof with respect to either of the issues identified in *Rowley*, and agree with the district court's conclusion that the proposed IEP for S.S.'s fourth-grade year was inappropriate under IDEA.

Appendix A

B. *Appropriateness of Private School Placement*

Once it is established that a school district's IEP is inappropriate, we must consider whether "the private education services obtained by the parents were appropriate to the child's needs." *Walczak*, 142 F.3d at 129. We have not previously decided who bears the burden of proving that the private school placement is appropriate. The SRO stated that the burden rests with M.S., and the parties have not briefed the issue. The Third Circuit has held that this burden rests on the parents of learning disabled children. *See Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995). We agree that the burden falls on M.S. as the party who selected the Stephen Gaynor School. *Cf. School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373-74 (1985) ("[P]arents who unilaterally change their child's placement . . . without the consent of state or local school officials, do so at their own financial risk."). Because M.S. chose a private school for S.S. that educated learning disabled students *only*, M.S. bears the burden of proving that such a restrictive, non-mainstream environment was needed to provide S.S. with an appropriate education.

The SRO found that the Stephen Gaynor School was an inappropriate alternative placement for S.S. because M.S. failed to demonstrate that the school addressed his son's special education needs during the 1997-98 school year, or that S.S.'s placement in the Stephen Gaynor School was consistent with IDEA's requirement that children with disabilities be educated in the least restrictive appropriate educational environment.

Appendix A

The SRO based his finding on evidence that S.S.'s reading level had not improved and his spelling level had declined during that school year, as well as the fact that the restrictive environment at the Stephen Gaynor School was inappropriate in light of S.S.'s relatively mild disabilities.

The district court reweighed the evidence in the record and reversed the SRO's finding that the Stephen Gaynor School was an inappropriate placement under IDEA. The district court concluded that (i) the SRO's finding that S.S.'s special education needs were not addressed during the 1997-98 school year was "not supported by the preponderance of the evidence in the record" and (ii) the SRO's finding that the Stephen Gaynor School was not the least restrictive environment did not bar reimbursement because "the test for parents' private placement is not perfection," and, in any event, "although not abundantly clear from the record before this Court, given S.S.['s] documented learning disabilities, the environment of the Stephen Gaynor School may well be the least-restrictive environment necessary to provide S.S. with a meaningful education and not just trivial advancement." We believe that the district court did not afford appropriate deference to the SRO. *See Briggs*, 882 F.2d at 693.

As to the issue of S.S.'s special education needs, the district court did not explain why it discredited the SRO's interpretation of the objective evidence, and the court based its findings primarily on non-objective evidence, such as M.S.'s testimony that his son had an increased joy of reading and that he was happier with his friends. We believe the district court thus inappropriately substituted its own

subjective judgment about what are appropriate measures for educational progress. *See e.g. Walczak*, 142 F.3d at 130 ("[T]he district court did not point to any objective evidence that led it to reject the administrative officers' conclusions . . . ."); *Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988) ("[A] court upsetting the [administrative] officer's decision [about an IEP] must at least explain its basis for doing so."); *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984) (noting that in making its own independent ruling, a court must carefully consider the findings made during administrative review "and endeavor to respond to the hearing officer's resolution of each material issue"), *aff'd*, 471 U.S. 359 (1985). An assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience, particularly where, as was the case here, the district court's decision was based solely on the record that was before the SRO.

As to the restrictive nature of the Stephen Gaynor School, we recognize that parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board. *See Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) ("[T]he test for the parents' private placement is that it is appropriate, and not that it is perfect."); *Cleveland Heights-University Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 399-400 (6th Cir. 1998) (holding private placement's failure to meet IDEA's mainstreaming requirement does not bar parental reimbursement). Nonetheless, IDEA's requirement that an appropriate education be in the mainstream to the extent possible, *see* 20 U.S.C. § 1412(5)(B) (1994), remains a

consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate, as it was here.

Given the deference we owe to the SRO's conclusions regarding the formulation of educational programs, and our review of the record, we defer to and accept the SRO's supportable finding that the Stephen Gaynor School was an inappropriate placement for S.S. Because tuition reimbursement is available only for an appropriate private-school placement, and the SRO made the supportable finding that the Stephen Gaynor School was not appropriate, we reverse the district court's judgment ordering the School Board to reimburse M.S. for the cost of S.S.'s tuition at the school.

CONCLUSION

For the forgoing reasons, the judgment of the district court is reversed.

APPENDIX B — AMENDED MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 7, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 0958 (BDP)

"M.S." on behalf of "S.S.," his minor child,

Petitioner,

– against –

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF YONKERS,

Respondents.

AMENDED MEMORANDUM AND ORDER[1]

BARRINGTON D. PARKER, JR., U.S.D.J.

Plaintiff M.S. brings this action on behalf of his minor child, S.S., claiming that the defendant Board of Education of the City School District of the City of Yonkers ("District") failed to provide S.S. with an appropriate individualized educational program ("IEP"), in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401, et seq.

---

1. The New York State Respondents have been removed from the caption.

Appendix B

Plaintiff seeks a declaration that the District's IEP for the 1997/1998 school year was inadequate and an order requiring the District to pay tuition costs for S.S.' attendance at the Stephen Gaynor School, a private school specializing in the education of learning disabled children. Pending are cross-motions for summary judgment. For the following reasons, defendant's motion is denied and plaintiff's motion is granted.

BACKGROUND

From kindergarten to third grade S.S. attended the Hawthorne PEARLS School in Yonkers. PEARLS stands for the Program for Early and Rapid Learners — it is the talented and gifted program in the District. In October 1996, while S.S. was in the third grade, his parents referred him to the committee on special education ("CSE") because he was experiencing difficulty reading and writing. Thereafter the CSE sent a "referral package" to S.S.' teachers to obtain information about his abilities. S.S. was described as having difficulties with handwriting, reading, spelling, arithmetic and was distractable. In December 1996, S.S. was evaluated by Dr. Oriole Peterfreund, a private licensed psychologist. Dr. Peterfreund's summary stated:

> [T]he pattern of [S.S.'] test scores are consistent with a specific learning disability. This is suggested by problems in sound symbol relationships, auditory discrimination, sustained attention, temporal concepts, sequencing, handwriting, and organizational skills. [S.S] is a bright youngster whose learning difficulties interfere with the full use of his intellectual

> potential. . . . It is recommended that [S.S.] receive intensive individual remediation to enable him to overcome his difficulties and to achieve at a level appropriate for his age and ability.

In January 1997, S.S. was evaluated by Dr. Raymond Copeland, a CSE psychologist. Dr. Copeland found that S.S. was not a candidate for special education and instead found that S.S. had issues with his self-image that should be addressed through family counseling.

On February 3, 1997, the CSE convened, classified S.S. as learning disabled and developed his IEP for the remainder of his third grade year (March to June 1997). The IEP recommended that S.S. receive resource room one period per day. This IEP is not contested in the action.

On May 2, 1997, Dr. Peterfreund re-evaluated S.S. Dr. Peterfreund stated:

> [S.S.] has been receiving help from a resource room teacher and private tutoring at home twice a week. Despite this assistance, the present evaluation indicates significant deficits in basic skills. To enable [S.S] to achieve at his intellectual level, it is important that he receive intensive remedial instruction geared to his individual learning needs. Previous test findings are consistent with a specific learning disability. Since this is a multifaceted problem affecting many areas of functioning including writing, spelling, language and math in addition to reading, it is felt that a special school setting with small

class size that can provide a total learning environment would be the most appropriate placement for [S.S.].

On May 21, 1997, the CSE reconvened to formulate S.S.' IEP for the 1997/1998 school year. The 1997/1998 IEP recommended that S.S. receive two periods of resource room services per day and that S.S. remain in PEARLS. On June 16, 1997, M.S. rejected the 1997/1998 IEP and notified the District that S.S. would be placed at the Stephen Gaynor School. Stephen Gaynor is a private school in Manhattan with 108 students, all of whom are learning disabled. Each class has 9 students, with 3 teachers. M.S. also requested an impartial hearing to consider tuition reimbursement.

The Impartial Hearing was held on April 23, 1998 to determine whether the 1997/1998 IEP was sufficient and whether M.S. was entitled to tuition reimbursement for the Stephen Gaynor School for the 1997/1998 school year. The District presented two witnesses: Harrel Morris, CSE Chairperson and Sandra Hauss, S.S.' PEARL classroom teacher for the third grade. The parents presented: Ann Miller, the Special Education Teacher Coordinator of the Stephen Gaynor School as well as one of S.S.' teacher for the 1997/1998 school year and the child's father, M.S.

At the hearing Ms. Hauss described S.S. as a bright student, somewhere in the middle of her third grade class, who had problems with paying attention, communication arts, fine motor skills, but that by the end of the school year had made improvement in the communication arts area and was generally meeting expectations. Ms. Miller described S.S.' learning disabilities and further concluded that S.S.

could not perform a fourth grade curriculum in a regular classroom. She further stated that if placed in a general education setting even with resource room, given S.S.' serious delays in processing, receiving learning and integrating information, S.S. would soon fall behind and his self-esteem would be further damaged.

The Impartial Hearing Officer ("IHO") held that the District was providing S.S. an appropriate education that was meeting his needs, and therefore the parents were not entitled to tuition reimbursement. Further, the IHO held that even if the education provided by the District were inappropriate, the parents would still not be entitled to any tuition reimbursement because the record had not established that the program at Stephen Gaynor was appropriate.

M.S. appealed the decision of the Impartial Hearing Officer to the State Review Officer ("SRO"). The SRO affirmed in part and reversed in part. The State Review Officer held that the 1997/1998 IEP did not adequately describe S.S.' disabilities and needs. Specifically, the SRO stated, "I find that the IEP description, while generally accurate, does not describe the extent of the child's disability. This is especially significant because an IEP must describe a child's present levels of performance and individual needs with respect to academic, social, and physical development and management needs." He found that the IEP's annual goals were too vague to provide S.S.' teacher with direction with the CSE's expectations. Further, he noted that "despite the fact that there is no dispute about the child's very weak spelling skills, his IEP goals and objectives do not address his encoding (spelling) difficulties." The SRO denied tuition reimbursement, however, because he found that S.S.' parents

had not met their burden of proof with regard to the appropriateness of the placement at the Stephen Gaynor School. Specifically, the SRO stated that the parents had neither demonstrated that S.S.' special education needs were addressed during the 1997/1998 school year nor that the placement at the school was the least-restrictive environment. M.S. then appealed the SRO's decision to this Court.

DISCUSSION

The IDEA represents "an ambitious federal effort to promote the education of handicapped children." *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). Under the IDEA, states receiving federal funding must provide disabled children with a "free appropriate public education." 20 U.S.C. § 1412(1). Such a "free appropriate public education" must include "special education and related services" tailored to meet the unique needs of the disabled child, *id.* § 1401(a)(18), and must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207.

In complying with the IDEA, the state must enumerate the particular educational needs of a disabled child and the services to be provided to meet those needs annually in a written IEP. *See* 20 U.S.C. § 1414(a)(5). An IEP must state, (1) the child's present level of educational performance; (2) the annual goals for the child, including short-term instructional objectives; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a school setting; (5) the projected initiation date and duration for proposed services; and (6) objective

criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. *See* 20 U.S.C. § 1401(a)(20).

Parents who are dissatisfied with a proposed IEP may file a complaint with the appropriate state educational agency. *Id.* § 1415(b)(1)(E). The state must then provide an "impartial due process hearing," at which time school authorities have the burden of showing the appropriateness of the proposed IEP. *Id.* § 1415(b)(2); *see also Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998). Following the decision from that hearing, an aggrieved party may appeal to the state educational agency. *See* 20 U.S.C. § 1415(c). Finally, after the state educational agency has issued its opinion, a party may bring suit in state or federal court to review the agency's decision. *See id.* § 1415(e)(2).

When the parents of a disabled child file suit under the IDEA to challenge a state-proposed IEP and when the relief they seek includes reimbursement of expenses incurred at a private school, an award will be entered in their favor if it appears (1) that the proposed IEP was inadequate to afford the child an appropriate public education, and (2) that the private education services obtained by the parents were appropriate to the child's needs. *Walczak*, 142 F.3d at 129 (citing *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 370, 105 S.Ct. 1996, 2002-03, 85 L.Ed.2d 385 (1985)); *accord Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-14 (1993) (where both prongs of the *Burlington* test are satisfied, court may require state to reimburse parents for expenses incurred at a private school

even though it is not on state-approved placement list). Here, the Court must determine, based on a preponderance of the evidence, whether the educational program in question was reasonably calculated to allow S.S. to receive educational benefits. *See Rowley*, 458 U.S. at 206-07.

The challenged decision is subject to "independent" judicial review, *Id.* at 205, but this "independent" review "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review," *id.* at 206; *Walczak*, 142 F.3d at 129. "While federal courts do not simply rubber stamp administrative decision, they are expected to give 'due weight' to these proceedings, mindful that the judiciary generally 'lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.' " *Walczak*, 142 F.3d at 129 (quoting *Rowley*, 458 U.S. at 206 (internal quotations omitted)); *Briggs v. Board of Educ.*, 882 F.2d 688, 693 (2d Cir. 1989) ("Deference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped."). Our Circuit has stated that for a federal court to conduct an independent review of a challenged IEP without impermissibly invading into state educational methodology, the court must examine the record for any objective evidence indicating whether the child is likely to make progress or to regress under the proposed plan. *Walczak*, 142 F.3d at 130.

In this case, the parties' dispute focuses on the adequacy of the 1997/1998 IEP, as well as the appropriateness of the unilateral placement at the Stephen Gaynor School.

Appendix B

The IDEA does not articulate any specific level of educational benefits that must be provided through an IEP. "The Supreme Court, however, has specifically rejected the contention that the 'appropriate education' mandated by IDEA requires states to 'maximize the potential of handicapped children.' " *Id.* (quoting *Rowley*, 458 U.S. at 197 n. 21, 189). The purpose of the Act was " 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.' " *Id.* The door of public education, however, must be opened for a disabled child in a "meaningful" way. *Rowley*, 458 U.S. at 192. This is not done if an IEP affords the opportunity for only "trivial advancement." *Walczak*, 142 F.3d at 130 (citation omitted). "An appropriate public education under IDEA is one that is likely to produce progress, not regression." *Id.* (internal citations omitted).

Given the requirements outlined above for an appropriate IEP, I concur with the SRO's determination that the 1997/1998 IEP was not reasonably calculated to enable S.S. to receive educational benefits. The May 1997 evaluation of S.S. by Dr. Peterfreund indicated, *inter alia*, that without improvement in word analysis and phonic skills his progress would be slow and would effect other academic areas adversely. She also noted S.S.' continued difficulty with decoding skills and the fact that when adding double digits he proceeded from left to right. As the SRO correctly noted, the IEP did not describe the full extent of S.S.' disability. The IEP described S.S. as:

> a bright, motivated, verbal, creative student with attentional issues. His learning disability is seen

> in his difficulties with spatial organization and sequencing. [S.S.] works slowly and needs extra time to complete assignments. Phonic skills and sight vocabulary are weak; a multisensory approach is needed. He has an impulsive approach to reading but is able to make use of context cues. [S.S.] needs refocusing but responds to cues and reminders to stay on task.

The IEP also did not address S.S.' significant spelling problems. The preponderance of the evidence indicates that the SRO's assessment that the IEP failed to include objective data to establish a baseline from which S.S.' progress could be measured during the year and contained vague annual goals was proper and will not be disturbed by this Court.

The next determination is the appropriateness of the placement of the child at the Stephen Gaynor School. The Record demonstrates that S.S. benefitted academically and socially during the 1997/1998 academic year. Before the Impartial Hearing Officer, Ms. Miller, one of S.S.' teachers at the Stephen Gaynor School, testified that S.S. received small group instruction for math (five children) and reading (four children) and 2:1 remediation with reading, math and language specialists twice a week. Further, S.S. received an individualized program and because he loved hands-on activities, she and the other teachers frequently used manipulatives to teach S.S.. While Miller noted she had seen little improvement with his attentional problem because it was more of an organic/physiological issue,[2] he was

---

2. S.S. was diagnosed with attention deficit disorder, inattentive type and concurrent learning disabilities on April 16, 1998.

continually monitored, and she subsequently had seen academic progress.

Ms. Miller testified that when S.S. entered the school he had tremendous difficulty with sound-symbol relationships, all he had was a sight vocabulary, he could not discriminate any vowel digraphs, and as far as writing, his letters were formed from the bottom up. S.S.' progress report, which is an internal document, indicated that by mid-year S.S. had learned all digraphs, was mainly a sight reader, but phonics had improved greatly, and, concerning math skills, he had learned regrouping very satisfactorily. Further, it noted that although he entered the school reading at a 2.0 level, by mid-year he was at 2.5 and instructional 3.0. On the progress report S.S.' spelling level was noted at 1.5. The progress report also noted, however, that the strategy to improve S.S.' spelling would be weekly phonetic packets and that, when he spelled a word incorrectly he was to cover it and write it again. Also, notations of S.S.' continued attentional difficulties appeared throughout the report. S.S.' father's testimony before the IHO indicated that he noticed that S.S. had an increased joy of reading, that his writing was improving, and that he was a happier child with friends. Based on these factors, the SRO's determination that S.S.' special needs were not addressed during the 1997/1998 academic year is not supported by the preponderance of the evidence in the record. The Stephen Gaynor School was an appropriate placement given the significant academic improvements S.S. experienced in light of his learning disabilities.

The SRO also found that the placement was not the least-restrictive environment. The least-restrictive

environment requirement, however, does not bar reimbursement because "the IDEA requires that disabled students be educated in the least restrictive appropriate educational environment." *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999). Put simply, "an appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement. Thus, the test for the parents' private placement is that it is appropriate, and not that it is perfect." *Id.*

The record clearly demonstrates that the placement of S.S. at the Stephen Gaynor School was entirely reasonable and provided the child with the additional necessary services to address his learning disabilities. Further, the appropriateness of the placement is demonstrated by the fact that S.S.' teachers still experienced difficultly with his attentiveness even with a 3:1 ratio and S.S. was still able to progress academically and socially in a short amount of time. Further, as the Third Circuit has stated,

> Since the court was presented with only one option, it was not required to locate another school that would satisfy the least restrictive alternative requirement based on the entire pool of schools available, but rather was required simply to determine whether that one available choice would provide an appropriate education for [the student].

Id. Thus, given the patent inadequacy of an IEP that failed to document the full extent of S.S.' learning disabilities and to provide clear goals, S.S.' parents are entitled to tuition reimbursement for their unilateral placement of S.S.

irrespective of the District's contention that the Stephen Gaynor school was not the least restrictive environment. As stated above, the test for parents' private placement is not perfection. In any event, although not abundantly clear from the record before this Court, given S.S. documented learning disabilities, the environment of the Stephen Gaynor School may well be the least-restrictive environment necessary to provide S.S. with a meaningful education and not just trivial advancement.

CONCLUSION

For the above stated reasons, Court determines that, (1) S.S.' 1997/1998 IEP was not adequate, and (2) the unilateral private placement was proper and appropriate. Accordingly, M.S. is entitled to tuition reimbursement for the 1997/1998 school year. The plaintiff's motion for summary judgment is granted and the defendant's motion is denied. The Clerk of the Court is directed to enter judgment for the plaintiff and to close the case.

SO ORDERED

s/ Barrington D. Parker, Jr.
Barrington D. Parker, Jr.
U.S.D.J.

Dated: White Plains, NY
February 7, 2000

APPENDIX C — DECISION OF THE UNIVERSITY OF THE STATE OF NEW YORK, THE STATE EDUCATION DEPARTMENT DATED OCTOBER 6, 1998

No. 98-38

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
STATE REVIEW OFFICER

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the City School District of the City of Yonkers

* * *

DECISION

Petitioner appeals from the decision of an impartial hearing officer which upheld the recommendation by respondent's committee on special education (CSE) that petitioner's son be instructed in a regular education program with resource room services during the 1997-98 school year, and which denied petitioner's request for an award of tuition reimbursement for that school year. The appeal must be sustained in part.

Respondent requests that the appeal be dismissed on the ground that the notice of intention to seek review was not served upon it in the manner prescribed by Sections 275.8 and 279.2 of the Regulations of the Commissioner of Education. The regulations require that a notice of intention

to seek review be personally served upon the board of education, the school district clerk, chief school officer (superintendent of schools), or a person in the office of the superintendent who has been designated by the board of education to accept service. Although respondent has designated Ms. Marlene Miernik to accept service, she asserts in an affidavit annexed to respondent's answer that she did not receive the notice of intention to seek review. The original copy of the notice to seek review has a date stamp on it indicating that it was received by respondent's special education department on July 15, 1998. There is also a signature of a Ms. Braio, indicating that the notice of intention to seek review had been received. In an affidavit, the process server asserts that he was directed to the special education department by respondent's staff. The purpose of the notice of intention to seek review is to alert the board of education of its duty to promptly file the record of the hearing with the State Education Department (*Application of the Board of Education of the Florida UFSD*, Appeal No. 92-10). Petitioner's failure to serve the notice of intention in the prescribed manner does not afford a basis for dismissing this appeal (*Application of a Child Suspected of Having a Disability*, Appeal No. 93-45; *Application of a Child with a Disability*, Appeal No. 95-66).

Petitioner's son, who is eleven yeas old, was enrolled in respondent's Program for Early and Rapid Learners (PEARL) at its Hawthorne School from kindergarten through the end of the third grade. The PEARL program is a general education program for gifted and talented students (Transcript, page 27). On the child's cumulative school record (Exhibit 21), his school achievement for kindergarten through third grade

in PEARL is described as slow. The record also indicates that he received "extra help" and was tutored by his aunt during the 1994-95 school year, when he was in the first grade. He received computer assisted remedial instruction during the 1995-96 school year.

In a letter dated October 15, 1996, petitioner referred his son to the CSE, which sent a "referral packet" (Exhibit 6) to the child's school to obtain information about the child. In the completed packet, the child was described as having weaknesses in his ability to sit still and pay attention, writing mechanics (such as spelling), reading, and fine motor control. He reportedly had earned grade equivalent scores of 3.0 for reading and 2.1 for mathematics on the California Achievement Tests which were administered in April, 1996, when the child was in the second grade. The child's third grade teacher reported that his phonics skills were weak and he had much difficulty decoding new words. She also reported that the child had a limited sight vocabulary, but his auditory comprehension was good. The teacher indicated that the child was creative, but had difficulty expressing himself in writing, and made errors when copying material which was written on the blackboard.

The child was privately evaluated by a psychologist in December, 1996. He achieved a verbal IQ score of 110, a performance IQ score of 107, and a full scale IQ score of 109. Although the child had difficulty with handwriting, he demonstrated age-appropriate visual motor integration skills. Petitioner's son achieved standard scores of 93 for reading, 88 for spelling, and 94 for arithmetic on the Wide Range Achievement Test-3 (WRAT-3). On the Gray Oral Reading

Test-3, he achieved grade equivalent scores of 1.9 for rate, 2.3 for accuracy, 1.9 for passage, and 1.9 for comprehension. It should be noted that the child was in the third grade when he was tested. The psychologist reported that the child had made errors discriminating between the sounds at the end of words on a test of his auditory discrimination skills, but opined that the errors may have resulted from lapses in the child's attention. On the Stanford Binet Sentence Memory Test and the Word Fluency Test, the child achieved scores which were above his age level. However, he manifested organizational and attentional difficulties on the Rudell Cancellation Test. The psychologist recommended that the child receive intensive remediation, and suggested that he would benefit from a multisensory approach with an emphasis on phonics and word analysis techniques.

A school psychologist who evaluated the child in January, 1997 reported that the boy had achieved a verbal IQ score of 119, a performance IQ score of 87, and a full scale IQ of 104. He further reported that the child exhibited strength in the areas of acquired information, vocabulary, concentration, social judgment, receptive and expressive language, immediate auditory memory and visual motor skills. On the WRAT-3, the child achieved standard scores of 96 for word recognition, 94 for arithmetic. The school psychologist described petitioner's son as a sensitive, vulnerable child who had a poor self-image, but he opined that the child was not a candidate for special education.

On January 7, 1997, the child was observed by an assistant principal in a group of five children who were being instructed in a school hallway. The assistant principal

reported that the child was detached from the group and played with a pencil and loudly hummed to himself. At the hearing, the child's teacher testified that her class was broken into small groups which sat in the carpeted hallway, and that the behavior which the assistant principal observed was not unusual for this child.

On February 3, 1997, the CSE recommended that the boy be classified as learning disabled and receive resource room services in a group of no more than five children. Although the boy's individualized education program (IEP) did not indicate the frequency or amount of resource room services (cf. 8 NYCRR 200.4[c][2][vi]), the record reveals that he received those services five periods per week. Petitioner consented to his son's placement in the resource room program on March 4, 1997 (Exhibit 14). Shortly thereafter, petitioner wrote to respondent's Director of Special Education about various concerns regarding his son's educational program (Exhibits 15 and 16). On April 8, 1997, the Director of Special Education responded to petitioner's letter, and provided him with a copy of Part 200 of the Regulations of the Commissioner. She also indicated that she agreed that the child's IEP did not include enough annual goals to address his learning needs and would refer the child to the CSE (Exhibit 17). She did so on April 9, 1997 (Exhibit 22).

On May 2, 1997, the child was seen again by the private psychologist who had evaluated him in December, 1996. The psychologist reported that the child's scores on the Gates MacGinitie Reading Test were at a mid-second grade level, but noted that the child had shown some improvement in his sight word vocabulary. However, he continued to have

difficulty with reading decoding. The psychologist's informal assessment of the child's mathematics skills indicated that the child was having difficulty with the basic processes. She recommended that he be placed in a special school with small classes to ". . . provide a total learning environment [which] would be the most appropriate placement . . ." (Exhibit 18).

The child's teacher reported to the CSE that the child ". . . had more difficulty sitting still even for short periods" (Exhibit 19). She indicated that the child's peers had complained of being distracted by his constant movement and noise. The teacher also indicated that the child's phonics skills had improved, and that he recognized more sight words. She reported that his reading comprehension had also improved, and that his instructional level for reading was at 3.0 grade equivalent. Another teacher who was the child's mathematics teacher reported that his instructional level for mathematics was at the third grade level, although he had some difficulty processing word problems. The child was described as a creative writer who used short sentences and invented spelling. His handwriting had significantly improved. The child's report card for the 1996-97 school year (Exhibit 20) was consistent with his teacher's report to the CSE.

On May 21, 1997, the CSE reviewed the child's education program. It recommended that he continue to be classified as learning disabled, and it increased the amount of his resource room services to two periods per day for the 1997-98 school year. Although the space on the child's IEP for indicating the frequency and duration of the resource room services was left blank, the recommendation for two periods

per day of resource room services was set forth on the second page of the IEP (Exhibit 26). The CSE also recommended that the child have the benefit of certain testing modifications, such as extended time limits, testing in a separate location, having test questions read to him, and using a calculator on mathematics tests.

By letter dated June 16, 1997, petitioner's attorney informed the CSE chairperson that petitioner would not accept the CSE's recommendations, and had unilaterally enrolled his son in the Stephen Gaynor School in New York City for the 1997-98 school year. The attorney requested that an impartial hearing be held. Respondent appointed a hearing officer on July 16, 1997. Petitioner's attorney withdrew his request for a hearing at last temporarily, after the parties' attorneys had agreed that respondent would transport the child to the Stephen Gaynor School (Exhibit 4). Thereafter, the parties stipulated that a hearing would be held before the hearing officer who had been previously selected to conduct the cancelled hearing. It was scheduled for November 10, 1997, but it was adjourned at the request of the parties until April 23, 1998, when the hearing was held.

In his decision which was rendered on June 17, 1998, the hearing officer noted that a board of education may be required to pay for educational services obtained for a child by the child's parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (*School Committee of the Town of Burlington* v. *Department of Education, Massachusetts*, 471 U.S. 359 [1985]). The fact that the

facility selected by the parents to provide special education services to the child is not approved as a school for children with disabilities by the State Education Department (as is the case here) is not dispositive of the parents' claim for tuition reimbursement (*Florence County School District Four et al.* v. *Carter by Carter*, 510 U.S. 7 [1993]). The board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (*Matter of Handicapped Child*, 22 Ed. Dept. Rep. 487; *Application of a Child with a Handicapping Condition*, Appeal No. 92-7; *Application of a Child with a Disability*, Appeal No. 93-9). To meet its burden, the board of education must show that the recommended program is reasonably calculated to allow the child to receive educational benefits (*Bd. of Ed. Hendrick Hudson CSD* v. *Rowley*, 458 U.S. 176 [1982]), and that the recommended program is the least restrictive environment for the child (34 CFR 300.550[b]; 8 NYCRR 200.6[a][1]).

The hearing officer found that the educational program which the CSE had recommended for the child was appropriate to meet the child's needs during the 1997-98 school year. The hearing officer held that respondent had met its burden of proof with respect to the first of three *Burlington* criteria for an award of tuition reimbursement, thereby precluding petitioner from receiving tuition reimbursement. He further found that petitioner had failed to meet his burden of proof with respect to the second *Burlington* criterion, i.e., that the services provided to his son by the Stephen Gaynor School were appropriate for the child.

Appendix C

Petitioner challenges the hearing officer's decision on various grounds. He assert that the CSE which prepared his son's IEP on May 21, 1997 included only two voting members, and therefore lacked all of its required members. Petitioner relies upon the child's IEP, which has two columns, one of which is headed by the words "CSE Committee", beneath which the names of the CSE chairperson and a school psychologist appear. The second column, which is headed by the words "Other Participants", lists the names of the parent member, a resource room teacher, the child's third grade teacher, the child's parents, and an assistant principal. Although not all of those individuals were members of the CSE, the parent member and the child's teacher were clearly members of the CSE. The CSE chairperson testified at the hearing that she was a certified special education teacher. I find that petitioner's contention about the composition of the CSE is without merit (34 CFR 300.344[a]).

Petitioner asserts that the CSE failed to have the child observed in his resource room class prior to making its recommendation for the 1997-98 school year. While that appears to be true, there was no legal requirement that the CSE do so, since the CSE's recommendation did not involve a significant change in the child's placement requiring an evaluation.

Petitioner challenges the adequacy of his son's IEP for the 1997-98 school year. The initial question to be determined is whether that document accurately reflects the results of the child's evaluations and identifies his special education needs. I note that the IEP describes the child as:

Appendix C

> ". . . a bright, motivated, verbal, creative student with attention issues. His learning disability is seen in his difficulties with spatial organization and sequencing. [The child] works slowly and needs extra time to complete assignments. Phonic skills and sight vocabulary are weak; a multisensory approach is needed. He has an impulsive approach to reading but is able to make use of context clues. [The child] needs refocusing but responds to cues and reminders to stay on task" (Exhibit 26).

I find that the IEP description, while generally accurate, does not describe the extent of the child's disability. This is especially significant because an IEP must describe a child's present levels of performance and individual needs with respect to academic, social, and physical development and management needs (8 NYCRR 200.4[c][2][i]). Although this child's IEP has what appears to be a series of computer generated statements with respect to his academic, social and physical development and management needs, those statements do not include adequate objective data to establish a baseline from which the child's progress could be measured during the 1997-98 (34 CFR Part 300, Appendix C Question 36). I must therefore find that respondent's CSE failed to adequately describe the child's needs in his IEP.

Petitioner also challenges the appropriateness and adequacy of his son's IEP annual goals and short-term instructional objectives. An annual goal is a statement which describes ". . . what a child with a disability can reasonably be expected to accomplish within a twelve month period in the child's special education program" (*Ibid.*, Question 38).

Appendix C

Short-term instructional objectives are ". . . measurable, intermediate steps between the present levels of educational performance of a child with a disability and the annual goals that are established for the child" (*Ibid.*, Question 39). I note that there are four objectives, but no goal, for language arts, reading and writing on page 4 of the IEP, as well as a separate goal for writing (". . . will work to increase writing skills") on page 5 of the IEP. There is also an annual goal that the child "will increase study skills, work habits and organizational skills, and a goal that he will increase computational skills in mathematics." The child's final annual goal, which is that he ". . . will participate in and complete requirements of regular education courses," has no short-term objectives. I find that the child's IEP annual goals are too vague to provide the child's teacher with direction about the CSE's expectations (*Application of a Child with a Disability*, Appeal No. 94-8; *Application of a Child with a Disability*, Appeal No. 96-90). While I have reviewed the short-term objectives to see if they provide sufficient specificity, I must find that they are also inappropriately vague, e.g., "will apply concepts of the usage of language to classroom activities and real-life situations." I note that despite the fact that there is no dispute about the child's very weak spelling skills, his IEP goals and objectives do not address his encoding (spelling) difficulties.

Petitioner further challenges the appropriateness of the special education services, two periods of resource room per day, which the CSE recommended for the child. While I do not necessarily agree with petitioner's contention that his son's needs were too unique or severe to be addressed with resource room services, I must find that respondent has failed

to meet its burden of proof with respect to the appropriateness of the educational placement which it offered to the child for the 1997-98 school year because of its failure to adequately describe his educational needs and to construct IEP goals and objectives which specifically addressed those needs.

The child's parent bears the burden of proof with regard to the appropriateness of the services which the parent obtained for the child at the Stephen Gaynor School during the 1997-98 school year (*Application of a Child with a Disability*, Appeal No. 94-29; *Application of the Bd. of Ed. of the Monroe-Woodbury CSD*, Appeal No. 93-34; *Application of a Child with a Disability*, Appeal No. 95-57). In order to meet that burden, the parent must show that the services were "proper under the act" [Individuals with Disabilities Education Act] (*School Committee of the Town of Burlington* v. *Department of Education, Massachusetts*, *supra* 370), i.e., that the private school offered an educational program which met the child's special education needs (*Application of a Child with a Disability*, Appeal No. 94-29). The private school need not employ certified special education teachers, or have its own IEP for the child (*Application of a Child with a Disability*, Appeal No. 94-20).

The records reveals that at the Stephen Gaynor School the child was instructed with eight other learning disabled children in grammar, social studies, art, science, and physical education by one teacher with the help of one assistant. His instructional groups for reading and mathematics were four and five, respectively. In addition, the child received remedial reading and mathematics instruction in a group of two, twice

per week, as well as speech/language therapy twice per week and occupational therapy. According to the child's primary teacher in the Stephen Gaynor School, the child had a language processing deficit, including problems with sound/symbol relationships, memory, and temporal concepts, in addition to a "severe" attentional deficit. She testified that he had to be refocused about once every five minutes. She also testified that the child's ability to maintain his attention had improved for one day in the spring of 1998, after his medication dosage was changed. However, he had been absent from school since that day. She estimated that the child's instructional level in reading had been at a 2.0 grade level in September, 1997. The child's progress report (Exhibit 25) indicates that by the middle of the 1997-98 school year, the child's instructional reading level was at a 3.0 grade level. I note that the child's third grade teacher had reported that his reading instructional level was at a 3.0 grade level in May, 1997 (Exhibit 19). The child's progress report from the private school indicated that his spelling was at a 1.5 grade equivalent by the middle of the 1997-98 school year. However, the private psychologist who had evaluated him in December, 1996, reported that the child's spelling was at the second grade level (Exhibit 7). I find that petitioner has not demonstrated that his son's special education needs were addressed during the 1997-98 school year.

Petitioner must also show that his son's placement in a private school which serves children with disabilities, and thus provides no opportunity for instruction with this child's peers, is consistent with the requirement that children with disabilities be placed in the least *restrictive* environment (*P.J.* v. *State of Connecticut*, 788 F. Supp. 673 [D. Conn., 1972];

Appendix C

Application of a Child with a Handicapping Condition, Appeal No. 92-7, decision sustained *sub. nom.*, *Lord* v. *Bd. of Ed. Fairport CSD et al.*, 92-CV-6286 [W.D. N.Y., 1994]). However, the requirement that children with disabilities be placed in the least restrictive environment must be balanced against the requirement that they receive an appropriate education (*Briggs* v. *Bd. of Ed. of the State of Connecticut*, 882 F. 2d 688 [2d Cir., 1989]).

In this instance, the parties present significantly different pictures of the extent of this child's learning disability and his attentional problems. With respect to the latter, I note that the child was diagnosed as having an attention deficit disorder (ADD) by a private physician on April 16, 1998 (Exhibit 24), almost one year after the CSE had made its recommendation. I have carefully considered the testimony by the child's third grade teacher in Yonkers and his fourth grade teacher at the Stephen Gaynor School. Although the child's attention wandered while in a traditional class of 30 students and a small special education class at Stephen Gaynor, I am not persuaded that his management needs were so severe as to require the highly restrictive placement in a private school. Similarly, while the child had academic deficits, he had only recently been receiving resource room services and was benefiting from those services when the CSE recommended that he continue to receive resource room services for the 1997-98 school year. Upon the record before me, I find that petitioner has not met his burden of proof with respect to the appropriateness of the services provided to his son by the Stephen Gaynor School during the 1997-98 school year.

Appendix C

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the hearing officer's finding that respondent had met its burden of proof with respect to the appropriateness of the services which it offered to provide during the 1997-98 school year is hereby annulled, but his finding that petitioner had not met his burden of proof with respect to the appropriateness of the services which the private school provided is sustained.

Dated: Albany, New York
October 6 , 1998

s/ Frank Muñoz
FRANK MUÑOZ

APPENDIX D — IMPARTIAL HEARING OFFICER'S INTRODUCTORY MATERIALS, DISCUSSION, AND DECISION DATED JUNE 17, 1998

IMPARTIAL HEARING SUMMARY FORM

1. Hearing Requested by Parents

2. Date of Written Request for Hearing: 6/15/97

3. Date of BOE app't of IHO: 7/16/97

4. C.S.E.

5. School District — Yonkers Public Schools

6. LEA Case Number

7. Region or County — Westchester

8. Specific Extension of Timeline Requested by Parent or School District: See Notes Attached.

9. Date the Extension was granted by IHO: See Notes Attached.

10. Number of Days Specific Extension of Time Was Granted by IHO: See Notes Attached.

11. Reason for Extension of Time: See Notes Attached.

12. Date of Hearing: 4/23/98

13. Child's Designated Disability at Time of Hearing: Learning Disabled.

Appendix D

14. Child's Placement at Time of Hearing: Stephen Gaynor School (Unilateral placement by Parents). District recommends placement in local school.

15. Issue of Hearing: Tuition Reimbursement

16. Date of Decision: June 17, 1998

17. IHO Decision: Parents' request for Tuition Reimbursement denied.

18. IHO Signature: s/ Eugene M. Kaufman

19. Date Forwarded to SED: June 17, 1998

EXHIBITS ENTERED INTO EVIDENCE AT THE HEARING. ALL WERE ENTERED AS HEARING OFFICER'S EXHIBITS ON CONSENT BY BOTH PARTIES.

1– Letter dated 6/16/97 from Mr. Rosenberg to Ms. Morris. In evidence at page 20 of the record. 1 page.

2– Letter dated 7/3/97 from Ms. Miernik to Mr. Kaufman. In evidence at page 20 of the record. 1 page.

3– Letter dated 7/17/97 from Ms. Miernik to Mr. Kaufman. In evidence at page 20 of the record. 1 page.

4– Letter dated 7/15/97 from Mr. Rosenberg to Ms. Johnston. In evidence at page 20 of the record. 1 page.

Appendix D

5– Letter dated 10/15/96 from Mr. S. to Ms. Morris. In evidence at page 20 of the record. 1 page.

6– Psychological Report dated 1/10/97. In evidence at page 20 of the record. 4 pages.

7– Psychological Report dated 12/14, 21 & 28/97. In evidence at page 20 of the record. 5 pages.

8– Psychological evaluation dated 1/6 & 7/97. In evidence at page 20 of the record. 4 pages.

9– Social History dated 2/97. In evidence at page 20 of the record. 1 page.

10– Medical History dated 3/30/94; 12/19/94 & 1/3/97. In evidence at page 20 of the record. 1 page.

11– Classroom observation report dated 1/7/97. In evidence at page 20 of the record. 1 page.

12– Fictional Book Report. In evidence at page 20 of the record. 3 pages.

13– I.E.P. for the period 3/97 – 6/97. In evidence at page 20 of the record. 3 pages.

14– Letter asking for acceptance or rejection of the C.S.E. recommendation dated 3/4/97. In evidence at page 20 of the record. 1 page.

Appendix D

15– Letter dated 3/7/97 from Mr. S. to Ms. LaDue. In evidence at page 20 of the record. 2 pages.

16– Letter dated 3/11/97 from Mr. S. to Ms. LaDue. In evidence at page 20 of the record. 1 page.

17– Letter dated 4/8/97 from Ms. LaDue to Mr. S. In evidence at page 20 of the record. 2 pages.

18– Psychological update dated 5/2/97. In evidence at page 20 of the record. 2 pages.

19– Reading Report dated 5/19/97. In evidence at page 20 of the record. 3 pages.

20– Student Progress Report 1996-97. In evidence at page 20 of the record. 1 page.

21– Elementary Cumulative Record. In evidence at page 20 of the record. 2 pages.

22– Letter dated 4/9/97 from Ms. LaDue to C.S.E. In evidence at page 21 of the record. 1 page.

23– Writing Sample. In evidence at page 21 of the record. 1 page.

24– Letter dated 4/16/98 from Dr. Wachtel to "To Whom it May Concern." In evidence at page 22 of the record. 1 page.

25– Comprehensive Progress Report for 1997-98. In evidence at page 22 of the record. 26 pages.

Appendix D

26– I.E.P. for 1997-98. In evidence at page 24 of the record. 5 pages.

27– Letter dated 2/22/97 from Mr. Kaufman to Ms. Johnston and Mr. Rosenberg. In evidence at page 135 of the record. 1 page.

WITNESSES WHO TESTIFIED THE HEARING.

Harrel Morris, C.S.E. Chairperson Testified on behalf of the District on 4/23/97. Her testimony appears at pages 26 – 76 of the Record.

Sandra Hauss, Classroom Teacher Testified on behalf of the District on 4/23/97. Her testimony appears at pages 76 – 106 of the Record.

Ann Miller, Teacher Coordinator of the Stephen Gaynor School Testified on behalf of the Parent on 4/23/97. Her testimony appears at pages 107 – 134 of the Record.

Mr. S., the child's father Testified on behalf of the Parent on 4/23/97. His testimony appears at pages 135 – 153 of the Record.

DISCUSSION:

On June 16, 1997, the attorney for the Parent sent a letter to the District's C.S.E. requesting an Impartial Hearing (H.O.Ex.1). On July 15th, the Parent's attorney sent another letter withdrawing the request for an Impartial Hearing. On July 22, 1997, the Hearing officer wrote to the attorneys for

the Parent and the District confirming the fact that the Parents were requesting a new Impartial Hearing; that the Hearing Officer was retaining jurisdiction and that the Hearing was scheduled to be resumed on November 10, 1997 (H.O.Ex.27).

Subsequent to the letter of July 22d (H.O.Ex.27), the parties adjourned the matter a number of times, until finally a Hearing was held on April 23, 1998.

At the commencement of the Hearing on April 23d, the attorney for the Parents waived the "45 Day Rule" (Trans.p.23).

THE PARENTS' POSITION:

The Parents contend that the District has failed to provide an appropriate education for their son, and that as a result they were forced to place him in the Stephen Gaynor School. They are now asking for tuition reimbursement.

THE DISTRICT'S POSITION:

The District claims that the program that it recommended for S.S. was appropriate to meet his needs, and in fact as the result of the program, S.S. had made educational gains.

The parents are seeking tuition reimbursement as the result of their unilateral placement of S.S. in the Stephen Gaynor School, which is a private school, and which is not on the list of approved schools as maintained by the New York State Department of Education.

Appendix D

It is the parents' claim that the district failed to provide their child with a Free Appropriate Public Education (FAPE), and that as a result they were forced to take the action that they did.

The United States Supreme Court in *School Committee of Burlington School District* v. *Department of Education*, 471 U.S. 359 (1993) held that there is a three prong test to determine if a parent is entitled to tuition reimbursement.

1– Did the District provide a free appropriate public education within the meaning of the Individuals with Disabilities Education Act (IDEA)? If the answer to this is in the affirmative, then the case is over and the parents lose. However, if the answer is in the negative, we then go to the second prong.

2– Is the program that is being offered at the private school appropriate to meet the needs of the student? If the answer is in the negative, then again, the parents lose and the case is over. However, if the answer is in the affirmative, then we go to the third prong of the *Burlington* test.

3– Are there equitable considerations present that either support or deny the parents' claim for tuition reimbursement.

Prior to the Court's decision in *Florence County School District Four* v. *Carter*, 114 S. Ct. 361, 1993, a district could refuse to reimburse parents for tuition if the private school was not on the State's approved list. However in the *Florence County* case, the Court held that the fact that a school was not on the State's approved list, did not bar parents from

receiving tuition reimbursement, providing that the parents could pass the three prong test set forth in *Burlington*.

At the commencement of the hearing, S.S. was 10 years, 2 months old, having been born on February 26, 1988. From Kindergarten through the third grade he attended the Hawthorne PEARLS School.

PEARLS stands for the "Program for Early and Rapid Learners" in the Yonkers School District.

In January, 1997, his parents referred him to the C.S.E., because he was having problems in reading and writing. On February 2, 1997, the C.S.E. after conducting a number of evaluations recommended that he be classified as "Learning Disabled" (L.D.), and that he remain in the PEARLS program with a resource room for 1 period a day with a 5:1 ratio.

A psychological evaluation conducted at that time showed that his Verbal IQ was 110; Performance IQ was 107 and Full Scale IQ was 109. It must be noted that his classification as L.D. is not in dispute.

During the 1996-97 school year he was reading at or close to grade level.

During the course of the hearing, Ms. Hauss, his 3d grade teacher testified that he was an average student, and that while he had some problems remaining focused on the assignment, he could be brought back to task (Trans.p.82). Ms. Hauss also testified that she felt that he was benefiting from being in her class, and that once he started in the resource room, he began to do better in his communications.

Appendix D

In May, 1997, the C.S.E. met again, and decided that because he was improving, he should remain in the PEARLS program, but with 2 periods a day of resource room. According to Ms. Morris, the reason for the extra period in the resource room was to help him improve on the improvement that he was making (Trans.p.47).

Part of the problem in this matter are the reports of the District's psychologist and the report of the Parents' psychologist.

In December, 1996, Dr. Peterfreund, a psychologist hired by the Parents conducted an evaluation of S.S. and recommended remediation for S.S. (H.O.Ex.7), it should be noted that Dr. Peterfreund's report found that S.S. was a bright youngster with an average to high intellectual range, and that he was scoring higher on his tests than his grade level.

In January, 1997, Dr. Copeland, the school psychologist issued his report (H.O.Ex.8), he agreed that S.S. should receive remediation in the resource room, but also recommended that he be placed in a more restrictive environment than the PEARLS program.

Ms. Morris testified that the C.S.E. rejected both reports, because of the success that S.S. was having in the PEARLS program with the 1 period of resource room, but as indicated earlier recommended that the resource room be increased to 2 periods a day.

On May 2, 1997, Dr. Peterfreund issued a follow up report (H.O.Ex.18) in which he recommended that S.S. be

placed in a much more restrictive environment in a "special setting with a small class size."

On April 16, 1998, the Parents produced a letter from Dr. Wachtel, which stated that he had diagnosed S.S. with ADD (H.O.Ex.18). Prior to this point in time, the District had no indication that S.S. had been diagnosed either with ADD or ADHD (Trans.p.75-76).

At the end of the 1996-97 school year, the Parents moved S.S. to the Stephen Gaynor School. The Stephen Gaynor School is a private school that has a student population of 108, all of whom are learning disabled.

Ms. Ann Miller, a teacher at the school testified that each class had 9 children with 3 teachers, making a 3:1 ratio.

Ms. Miller described S.S. as being easily distracted, and had a language processing problem. In her opinion, S.S. could not be in a mainstreaming class, but needed a complete Special Education Program, since, in her opinion he could not cope with the pressures put on him in competing with regular education students, and that as a result his self esteem would suffer.

According to Ms. Miller, S.S. was improving in this restricted environment, however she admitted that there was no improvement until April, 1998, when he began to take medication (H.O.Ex.118).

On cross examination, Ms. Miller testified that he gets his remediation in a "small room, tiny room" (Trans.p.125),

that the school is located in a brownstone, has 12 – 13 class rooms, no cafeteria, no auditorium, for a playground they use Central Park, but that they do have an Art room, Music room and a Gym, and that they don't have an I.E.P. (Trans.p.125).

Ms. Miller further testified that S.S. showed no improvement until he went on medication, which started about 3 weeks prior to the date of the Hearing (April 23, 1998), and that the change occurred after his dosage was increased, but that after the dosage was increased he got sick and has been out of school ever since, though she thought that he might have returned the day of the Hearing (Trans.p.130-131).

The final witness was Mr. S, S.S.'s father, who testified that while S.S. was making some progress, he was not satisfied with the progress and felt that he had to place his son in a different setting so that he could begin to catch up. Mr. S. feels that S.S. has made substantial progress in the Stephen Gaynor School.

While it is understood that a school district must provide a Free Appropriate Education for every child, including those with disabilities. The fact is that there is no requirement that the education be the best possible one, but that it is appropriate to meet the needs of the child.

The record in this case shows that the education that the District was providing for S.S. was meeting his needs, and that he was making progress, not as much as his father wanted, but he was making progress, and the District

recognized that additional remediation was needed, and that's why the C.S.E. proposed a second period in the resource room.

Obviously the teacher student ratio in the District, was not as good as the teacher-student ratio in the Stephen Gaynor School, but the Stephen Gaynor School had a much small enrollment.

What is interesting is that while Mr. S. indicates that S.S. was making good progress at the Stephen Gaynor School, Ms. Miller felt that there was no improvement until he started on medication, which was somewhere around the beginning of April, 1998.

Using the criteria set down in the *Burlington* decision, I find that the District was providing an appropriate education for S.S., and therefore the Parents are not entitled to any tuition reimbursement.

Let me state further, that even if the education that the District was providing were to be find not to be appropriate, the Parents still would not be entitled to any tuition reimbursement, since based upon the record, it can not be argued that the program at the Stephen Gaynor School was appropriate.

The request by the Parents of S.S. is therefore denied.

Appendix D

RIGHT OF APPEAL

If any party is dissatisfied with my decision they have the right of seeking a review of it by filing an appeal with a State Review officer of the State Education Department.

To obtain such a review, the party seeking same shall follow the procedures outlined in Part 279 of the Regulations of the Commissioner of Education. The time in which to seek such a review commences on the date that the copy of my decision is received.

The full details can be obtained from the Department of Education.

Dated: New Rochelle, N.Y. 10801
June 17, 1998.

s/ Eugene M. Kaufman
EUGENE M. KAUFMAN
Impartial Hearing Officer

(2)

Supreme Court, U.S.
FILED
FEB 28 2001
CLERK

No. 00-1197

In The

Supreme Court of the United States

October Term, 2000

M.S., on behalf of S.S., his minor child,

Petitioner,

– against –

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF YONKERS,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE W. THOMAS
JAMES P. DROHAN*
LINDA A. GERACI
DONOGHUE, THOMAS, AUSLANDER & DROHAN
2517 Route 52
Hopewell Junction, New York 12533
(845) 227-3000

*Counsel of Record *Counsel for Respondent*

SW

St. Louis West, Inc. (9258)
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper

21 pp

QUESTION PRESENTED

Whether this Court should review the determination below that petitioner failed to meet its burden of demonstrating the appropriateness of a private school placement under the Individuals with Disabilities Education Act.

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTERSTATEMENT 1

REASONS FOR DENYING THE PETITION 6

i. The conflict asserted to exist among the Circuits will not present itself for review on the record before the Court 6

ii. The "misappprehension of fact" alleged is neither preserved for the record nor properly before the Court for review 12

iii. The argument that the decision below leaves parents of disabled students without a remedy is meritless 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES:

Adams v. Oregon, 195 F.3d 1141 (9th Cir., 1999) 10

Board of Educ. v. Rowley, 458 U.S. 176 (1982) ..... *Passim*

Burilovich v. Board of Ed, 208 F.3d 560 (6th Cir., 2000) 10

California v. Taylor, 353 U.S. 553 (1957) 13

Dale M. ex rel Alice M. v. Board of Education of Bradley-Bourbounnais High School District No. 307, 237 F.3d 813 (7th Cir. 2001) 8, 10

Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1997) 10

Florence County School District #14 v. Carter, 510 U.S. 7 (1993) 14

CASES:

Fort Zumwalt School District v. Clynes, 119 F.3d 607; cert. den. 523 U.S. 1137 (8th Cir. 1998) 10

Gilbert v. Homar, 52 U.S. 924, (1997) 12

Lenn v. Portland S.D., 998 F.2d 1086 (1st Cir. 1993)..... 9

M.S. ex rel S.S. v. Board of Educ. of the City School Dist. of the City of Yonkers, 231 F.3d 96 (2d Cir. 2000)..... 1

School Committee of Burlington v. Department of Education, 451 U.S. 359 (1985) 1

Teague v. Independent School Dist., 999 F.2d 127, 131 (5th Cir. 1993)..... 9

OTHER AUTHORITY:

20 U.S.C. 1415(e)(2)..... 2

34 C.F.R. § 300.403(d)(6)(i) and (ii) 13

No. 00-1197

In The

Supreme Court of the United States

October Term, 2000

—♦—

M.S., on behalf of S.S., his minor child,

Petitioner,

– against –

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF YONKERS,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent Board of Education of the City School District of the City of Yonkers ("Board") requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case. The official citation for the decision below is M.S. ex rel S.S. v. Board of Educ. of the City School Dist. of the City of Yonkers, 231 F.3d 96 (2d Cir. 2000).

COUNTERSTATEMENT

Procedural History

1. Administrative Hearings – Petitioner had instituted an impartial hearing under the Individuals With Disabilities Education Act ("IDEA") in 1998 seeking reimbursement from respondent for the cost of tuition for their son at a private school under the test set forth in this Court's decision in School Committee of Burlington v. Department of Education, 451 U.S. 359, 369-370 (1985).

New York State has a two-tiered system for administrative prosecution of due process complaints under the Individuals with Disabilities Education Act. At the first tier, the impartial hearing officer ("IHO") [the only decision maker in this case who took testimony and, accordingly, had the opportunity to evaluate the credibility of witnesses] denied tuition

reimbursement on two alternative grounds: that the Board was providing S.S. with an appropriate education; and that the program at the private school was inappropriate for the student's needs. Pet. Br., "50a."

On appeal, the New York State Education Department's State Review Officer ("SRO") found that though the Board's individualized education plan ("IEP") was inadequate, the education afforded at the private school was also inadequate. Id., "43a-44a." The SRO found, specifically, that:

- the parent had not demonstrated that his son's special education needs were addressed at the private school. Id., "46a";

- the student's reading level had not improved at the private school and his spelling level had, in fact, declined while in attendance there. Id, "45a";

- the parent had not demonstrated that the student's placement in the private school was consistent with IDEA's requirements that children with disabilities be placed in the least restrictive environment, since the student's management needs were not so severe as to warrant placement in the private school while, academically, he had been benefitting from the educational services provided in the public school setting. Id., "46a."

2. District Court – Upon the parent's appeal to the District Court [pursuant to 20 U.S.C. 1415(e)(2)] the case was decided upon a motion (and cross-motion) for summary judgment. Neither party requested a hearing from the District Court, and none was conducted.

The District Court concurred with the SRO's finding that respondent's IEP was inadequate (A287). Although it had conducted no hearing, that Court found the private school constituted "...an appropriate placement" based upon the record before the SRO. JA289. The District Court's Opinion did not articulate any specific factual finding made by either the IHO or SRO with which it found fault in deciding to reverse on this issue. Pet. Br., at "29a-32a." The District Court also rejected respondent's argument (which had been adopted by the SRO) that the private school was not the "least restrictive environment" for the student:

> ...given the patent inadequacy of an IEP that failed to document the full extent of S.S. learning disabilities and to provide clear goals, S.S. parents are entitled to tuition reimbursement for their unilateral placement of S.S. irrespective of his contention that the (private school) was not the least restrictive environment. As stated above, the test for parents' private placement is not perfection. In any event, although not abundantly clear from the record before this Court, given S.S. documented learning disabilities, the environment of the Stephen Gaynor School may well be the least restrictive environment necessary to provide S.S. with a meaningful education and not just trivial advancement.

Id., at "31a-32a."

3. The Second Circuit's Decision – Upon appeal by the Board, the Second Circuit reversed the District Court's award of tuition reimbursement. In its decision, the Second Circuit reviewed the language of this Court's decision in Board

of Educ. v. Rowley, 458 U.S. 176, 206 (1982) as well as its own decisions, which point out that:

> ...(W)hile federal courts do not simply rubber stamp administrative decisions, they are expected to give due weight to these proceedings, mindful that the judiciary generally lack(s) the specialized knowledge and experience necessary to resolve persistent and difficult questions of education policy...

Id, at "18a."

According "due weight" to the SRO's decision (as petitioner requested with regard to the administrative finding of an inadequate IEP), the Circuit Court declined to disturb the administrative finding as to the IEP's inappropriateness. That Court acknowledged, however, that the record did reflect the student was "making progress" in respondent's public school. Id, at "14a."

Turning to the issue of the appropriateness of the private school, the Second Circuit held that the SRO's finding as to the inappropriateness of the private school was supported by the administrative record and, therefore, found the parent was not entitled to tuition reimbursement under IDEA.

In so ruling, the Second Circuit specifically found that the District Court had neither afforded deference to the SRO on the issue of the appropriateness of the private school (Id, at "17a"), nor proffered any explanation as to why it had discredited the SRO's assessment of the objective evidence. Id. It found, accordingly, that the District Court:

> ...inappropriately substituted its own subjective

> judgment about what are appropriate measures for educational progress.

Id., at "18a." The Second Circuit also held that:

> ...(A)n assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience, particularly where, as was the case here, the district court's decision was based solely on the record that was before the SRO.

Id., at "18a."

After the Second Circuit reversed, petitioner neither moved for reargument nor rehearing en banc below. This Petition ensued.

REASONS FOR DENYING THE PETITION

The Petition should be denied, since:

(i) The conflict asserted to exist among the Circuits (as to what constitutes "due weight" for the purpose of judicial review of an impartial hearing under IDEA) will not present itself for review on this record, since:

(a) no rational construction of the Second Circuit's holding supports the conclusion that a district court judge is "bound" to follow an administrative decision made under IDEA;

(b) the District Court, in any event, accorded no weight whatsoever to the SRO's finding on the appropriateness of the private school, a result which would not be countenanced under any interpretation of Rowley's "due weight" requirement.

(ii) The argument that the party seeking to accord "due weight" to an administrative decision under IDEA has the burden of proving the administrative officer's qualifications was neither litigated below nor is it properly part of the record before the court.

(iii) The argument that the decision below leaves parents of disabled students without a remedy is meritless.

i. **The conflict asserted to exist among the Circuits will not present itself for review on the record before the Court** – Petitioner argues certiorari should issue to determine whether this Court's decision in Rowley "...binds a district court judge to the decision of the administrative review officer" on an issue regarding private school

placement. Petition, "Question Presented" at "i." See also, Id., at "19."

> ...it is contrary to the spirit of the IDEA, and this Court's holding in Rowley for a judge to completely abdicate his responsibility to review the record and evidence before him and to defer to the decision of the administrative authority.

Id, at "19."

Even if that were a question this Court was otherwise disposed to address, this case simply does not present that issue for review on the record presented.

(a) no rational construction of the Second Circuit's holding supports the conclusion that it "binds" a district court judge to an administrative decision made under IDEA

First, no rational construction of the Second Circuit's decision warrants the conclusion that such decision requires a reviewing court to either "abdicate" its responsibility to review an administrative decision or be "bound" by the decision on the issue of the appropriateness of a private school. Neither directly nor by implication does the Second Circuit hold that an administrative hearing officer's findings under IDEA are conclusive on the District Court. The Circuit Court's decision avoids blind obeisance to the SRO's ruling, and instead is grounded upon that court's independent conclusion that the SRO's findings were amply supported by the record:

> ...(G)iven the deference we owe to the SRO's

> conclusions regarding the formulation of educational programs, and our review of the record, we defer to and accept the SRO's supportable finding that the (private) school was an inappropriate placement for S.S.

Pet., "19a." (emphasis supplied).

The decision below turned upon a fact-based review of the administrative record in which the Court examined whether the SRO's finding regarding the appropriateness of the private school was sufficiently supported by that record and, therefore, entitled to deference. While petitioner obviously disagrees with the Circuit Court's decision that the SRO's finding was supported by the record, that disagreement provides no basis for this Court's intervention.

The decision is, therefore, squarely in line with settled law that, under this Court's decision in Rowley, "due weight" should be accorded the administrative decision makers.

The Second Circuit's related observation that the weight accorded a district court decision is less where such court itself did not itself conduct a hearing is also entirely in line with the decisions of other circuits on this issue. See e.g., Dale M. ex rel Alice M. v. Board of Education of Bradley-Bourbounnais High School District No. 307, 237 F.3d 813, (7th Cir. 2001) ["...(w)hen the court has before it evidence that was not before the hearing officers, the amount of deference due the reviewing officer declines, since the latter's decision was based on an incomplete record. But when there either is no new evidence or the judge for some reason doesn't consider it, he owes considerable deference to the reviewing officer"].

Accordingly, the issue for which review is sought is not raised by the decision below.

(b) Since the District Court failed to accord any weight whatsoever to the administrative decision on the appropriateness of the private school, that decision would not have withstood appellate scrutiny under any definition of "due weight"

Another reason why this case presents no reviewable issue on "due weight" is that the District Court Judge accorded no weight whatsoever to the SRO's decision on the inappropriateness of the private school. As the Second Circuit pointed out, the District Court in this case impermissibly "...substituted its own subjective judgment" for that of the IHO and SRO on appropriate indicia of educational progress in a private school. Petitioner's brief as much as concedes this point in apparently urging that the District Court Judge could, in fact, appropriately substitute his judgment for that of the SRO:

> ...(s)urely the district court judge was equally qualified (as the SRO) to consider the record before him.

Pet. Br., p. 21.

As Petitioner's Brief recognizes, however, all circuits interpret Rowley's "due weight" requirement as mandating that some deference be accorded the administrative decision maker. See, Pet. Br., pp. 13-17. See also, Teague v. Independent School Dist., 999 F.2d 127, 131 (5th Cir. 1993) [...the district court should give the hearing officer's findings 'due weight,' even though hearing officer's findings are not conclusive]; Lenn v. Portland S.D., 998 F.2d 1083 (1st Cir. 1993) [IDEA requires a more critical appraisal of the agency determination than clear-

error review entails, but it nevertheless falls well short of complete de novo review]; Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1997) [hearing officer's findings of fact are considered prima facie correct; court must explain reasons if not following findings]; Burilovich v. Board of Ed, 208 F.3d 560, 566 (6th Cir., 2000) [weight due administrative decisions will vary, depending on whether the Court is reviewing procedural matters and whether educational expertise is essential to the administrative findings]; Dale M., supra at 237 F.3d 813 (7th Cir. 2001) [when district judge bases his decision on review of the record, he must accord "due deference" to record; mere disagreement with administrative decision insufficient; court must be "strongly convinced" order is erroneous]; Fort Zumwalt School District v. Clynes, 119 F.3d 607, 610, cert. den. 523 U.S. 1137 (8th Cir. 1998) [level of deference to administrative decision less than required under substantial evidence test, but consideration should be given to state hearing panel's opportunity to observe demeanor of witnesses]; Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir., 1999) [increased deference should be accorded hearing officer where findings are thorough and complete].

As this review demonstrates, while the language of the various circuits on decisions addressing "due weight" may not be identical, the common threads running through these decisions are that:

- the District Court's review of the administrative record is something less than de novo;

- some deference must be accorded the administrative decision maker, which deference may vary according to the attendant circumstances, including whether the District Court heard additional testimony, and whether the administrative

decision was thorough and closely reasoned.

Therefore, while petitioner may argue that "...the outcome of an (IDEA) appeal will likely depend upon the circuit or court in which it was filed" (Pet. Br., pp. 13-14) it is respectfully submitted the outcome of this particular case would not vary, since this district judge accorded no deference whatsoever to the administrative findings, which is inconsistent with any interpretation of Rowley's "due weight" requirement. As the Second Circuit noted, an assessment of educational progress is exactly the type of determination that educational authorities are presumptively entitled to make. An assessment of educational progress in the public school setting is also, in fact, exactly what petitioner sought from both courts below. Petitioner's argument is that State educational authorities are equipped to measure educational progress in public school settings, but that expertise is extinguished when the locus of education is a private school. Nothing in Rowley or its progeny warrants such a conclusion, nor does petitioner provide any support in case law for that proposition.

As the District Court in the case sub judice simply substituted its judgment for the administrative decision maker on the private school issue, that holding would not have withstood appellate scrutiny in any of the Circuit Courts. This Court, therefore, need not reach the issue of the purported "split" among the Circuits on this record.

To the extent petitioner now (under this argument) seeks a uniform definition of "due weight" from this Court which can be inflexibly applied to every IDEA review by a court (regardless of the attendant circumstances), we respectfully submit that invitation should be declined by the Court. "Due" weight (much like "due" process) is, by definition, a concept not

susceptible of rigid and formulaic application. See e.g., Gilbert v. Homar, 520 U.S. 924, (1997) ["...(d)ue process is flexible and calls for such procedural protections as the particular situation demands."] As "due weight" will similarly and necessarily vary with the particular situation, codification of that standard is neither necessary nor appropriate.

ii. **The "misappprehension of fact" alleged is neither preserved for the record nor properly before the Court for review.** – While conceding Rowley's "due weight" requirement, petitioner also urges this Court to graft onto Rowley's holding an additional requirement – that deference should only be accorded an administrative decision where the party seeking such deference is able to "...allege and prove..." the relevant expertise of the decision maker:

> ...(A)ny party asserting that deference should be paid to any lower authority decision should, at the very least, be required to allege and prove the basis for that deference beyond the existence of a mere job title. A degree in education, time spent making, reviewing or implementing educational policy are relevant determinants of the value of the decision maker's opinion.

Pet. Br., pp. 21.

This argument is not properly before the Court and inappropriate for this Court's review for the following reasons:

- This question was neither raised nor litigated in the courts below, a consideration which militates against this Court exercising review, especially where petitioner himself sought deference accorded to one aspect of the SRO's decision below.

See e.g., California v. Taylor, 353 U.S. 553, 556, n. 2 (1957).

- Nothing in either the statute, legislative history, or case law is proffered in support of this proposition; which would require the District Court to jettison the statutory scheme under IDEA for resolution of due process disputes; relegate the parties to defense of the decision maker in each case; and require the courts to eschew an administrative decision which is carefully and closely reasoned in favor of one where the administrative officer has an acceptable pedigree;

- Petitioner's remarks about the qualifications of this particular SRO (Pet. Br., p. 21) are dehors the record;

- Petitioner's premise that the Second Circuit was laboring under a "misapprehension of fact" (Pet. Br., p. 21) does not warrant this Court's review under its Rule 10 (stating that a Petition for Writ of Certiorari is "...rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

(iii) **The argument that the decision below leaves parents of disabled students without a remedy is meritless** – Petitioner's final argument – that the Second Circuit's decision leaves parents confronted with an inadequate IEP without a remedy – does not warrant this Court's review. Parents can return to the CSE and request an appropriate IEP, or [once notice has been provided to the district; see 34 C.F.R. § 300.403(d)(6)(i) and (ii)] commence an impartial due process hearing seeking tuition reimbursement ; a change in placement; compensatory education or some other remedy. Under settled law, parents may, of course, obtain tuition reimbursement if (unlike the case sub judice) the private school is found to be appropriate.

BEST AVAILABLE COPY

At the end of the day, the decision of the Second Circuit simply reiterates that while IDEA does not sanction inappropriate public placements, neither does it sanction inappropriate private placements. This holding is entirely consistent with this Court's teaching that:

> ...parents who...unilaterally change their child's placement during the pendency of review proceedings, without the consent of the state or local school officials do so at their own financial risk.

Florence County School District #14 v. Carter, 510 U.S. 7, (1993), citing, Burlington, at 471 U.S. 373-374.

Accordingly, the argument that the decision below deprives parents of an effective remedy under IDEA for an inadequate school district placement is without merit.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

Lawrence W. Thomas
James P. Drohan*
Linda A. Geraci
Donoghue, Thomas,
Auslander & Drohan
2517 Route 52
Hopewell Junction, New York 12533
(845) 227-3000

* Counsel of Record

Counsel for Respondent